Office - Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-2071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Petitioners,

v.

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER and MAGDA S. LEUCHTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioners, State of New Jersey; Brendan T. Byrne as Governor of the State of New Jersey; Department of Law and Public Safety; John J. Degnan as Attorney General of the State of New Jersey; Executive Commission on Ethical Standards; Angelo Bianchi, Richard Mount, Warren Smith, Jacob Taporek, Edward Hofgesang and Joan Haberle as members of the Excutive Commission on Ethical Standards
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-4965

MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

WILLIAM HARLA
Deputy Attorney General
On the Petition

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

32pp

Questions Presented

Whether plaintiffs who successfully challenge a State of New Jersey law on federal constitutional grounds without satisfying the jurisdictional requirements of 42 *U.S.C.* §1983 and who obtain a judgment clarifying the scope of the law are entitled to attorneys' fees under the "Civil Rights Attorney's Fees Awards Act of 1976," 42 *U.S.C.* §1988, even though the State defendants did not take or threaten to take action enforcing the challenged law and where the only harm complained of in the Complaint relates solely to the passage of the challenged law by the State Legislature for which that body, not named as a defendant, is entitled to absolute legislative immunity both from damages and attorneys' fees.

Whether "special circumstances" would render an award of attorneys' fees under 42 *U.S.C.* §1988 "unjust" in this case where the named State defendants did not take or threaten to take action to enforce a State law challenged by plaintiffs in what is functionally a simple declaratory judgment action.

Interested Parties

The parties set forth in the caption of this Petition for *Certiorari* are the interested parties.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	9
The Court should grant certiorari to settle the unresolved issue of whether attorney's fees may be awarded under 42 *U.S.C.* §1988 even though none of the defendants took or threatened to take any action to enforce *L.* 1980, *c.* 79 which would subject them to liability under 42 U.S.C. §1983; also, attorney's fees should be denied in this case because there are "special circumstances" which would render an award of fees "unjust"	9
A. Plaintiffs are not entitled to an award of attorney's fees under 42 U.S.C. §1988 because they have not met the prerequisites for obtaining relief under any of the civil rights statutes listed in 42 *U.S.C.* §1988, specifically 42 *U.S.C.* §1983, which entitles a prevailing party to an award of attorneys' fees	10

PAGE

B. "Special Circumstances" would render an award of attorney's fees in this case "unjust" since the State defendants did not take action or threaten to enforce the challenged State law and since no such action was even alleged in plaintiffs' complaint 20

CONCLUSION 22

APPENDIX:

A—*L.* 1980, *c.* 79 of New Jersey 1a

B—*N.J.S.A.* 52:13D-21 ..... 5a

C—Veto Message to Senate Bill 1369 (1980), dated November 24, 1980 ..... 8a

D—*L.* 1980, *c.* 28 ..... 12a

E—*L.* 1980, *c.* 69 ..... 30a

F—*L.* 1980, *c.* 159 ..... 42a

G—Plaintiffs' Complaint Filed August 29, 1980 in the Superior Court of New Jersey 46a

H—Plaintiffs' Amended Complaint Filed September 25, 1980 in the Superior Court of New Jersey 70a

I—Defendants' Answer Filed October 17, 1980 72a

J—Oral Opinion of the Hon. George Y. Schoch, Judge, Superior Court, Issued November 25, 1980 ..... 78a

PAGE

K—Order Granting Summary Judgment Filed January 16, 1981 ..... 85a

L—Opinion of the Appellate Division, Superior Court Filed June 1, 1982 ..... 88a

M—Opinion of the New Jersey Supreme Court Decided March 19, 1984 ..... 93a

N—S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ..... 110a

O—H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 122a

PAGE

Table of Authorities

Cases Cited

Adickes v. *S.H. Kress and Company*, 398 U.S. 144 (1970) 14, 15

Alyeska Pipleine Service Co. v. *Wilderness Society*, 421 *U.S.* 240 (1975) 10, 11, 13

Boyle v. *Landry*, 401 *U.S.* 77 (1971) 16

Chastang v. *Flynn & Emrich Co.*, 541 *F.*2d 1040 (4th Cir. 1976) 21

Consumers Union of U.S., Inc. v. *American Bar Ass'n*, 427 *F. Supp.* 506 (E.D. Va. 1976) (Consumers Union I) 8

Consumers Union of U.S., Inc. v. *Virginia State Bar*, 433 *U.S.* 917 (1977) (Consumers Union II) 8

Consumers Union of U.S., Inc. v. *American Bar Ass'n*, 470 *F. Supp.* 1055 (E.D. Va. 1979) (Consumers Union III) 8

Consumers Union of U.S., Inc. v. *American Bar Ass'n*, 505 *F. Supp.* 822 (E.D. Va. 1981) (Consumers Union V) 8

Consumers Union of U.S., Inc. v. *Virginia State Bar*, 688 *F.*2d 218 (4th Cir. 1982) (Consumers Union VI) 8, 16, 21

Coop v. *City of South Bend*, 635 *F.*2d 652 (7th Cir. 1980) 21

Criterion Club of Albany v. *Board of Comm'rs.*, 594 *F.*2d 118 (5th Cir. 1979) 21

Entertainment Concepts, Inc. v. *Maciejewski*, 631 *F.*2d 497 (7th Cir. 1980) 21

PAGE

Fialkowski v. *Shapp*, 405 *F. Supp.* 946 (E.D. Pa. 1976) 16

Flagg Brothers, Inc. v. *Brooks*, 436 *U.S.* 149 (1978) 14

Gilbert v. *Gladden*, 87 *N.J.* 275, 432 *A.*2d 1351 (1981) 22

Gras v. *Stevens*, 415 *F. Supp.* 1148 (S.D. N.Y. 1976) 16

Hensley v. *Eckerhart*, —— *U.S.* ——, 103 *S.Ct.* 1933, 76 *L.Ed.*2d 40 (1983) 21

Imbler v. *Pachtman*, 424 *U.S.* 409 (1976) 15

Konczak v. *Tyrrell*, 603 *F.*2d 13 (7th Cir. 1979), *cert. denied* 444 *U.S.* 1016 (1980) 21

Lucky Calendar Co. v. *Cohen*, 19 *N.J.* 399, 117 *A.*2d 487 (1955) 18

Lugar v. *Edmondson Oil Co., Inc.*, 457 *U.S.* 922 (1982) 20

Luria Brothers & Co., Inc. v. *Allen* 672 *F.*2d 347 (3rd Cir. 1982) 13, 14

Maher v. *Gagne*, 448 *U.S.* 122 (1980) 13

Maine v. *Thiboutot*, 448 *U.S.* 1 (1980) 13, 14, 19

Monell v. *Department of Social Services*, 436 *U.S.* 658 (1978) 15

Monroe v. *Pape*, 365 *U.S.* 167 (1961) 15

Naprstek v. *City of Norwich*, 433 *F. Supp.* 1369 (N.D. N.Y. 1977) 21

Newman v. *Piggie Park Enterprises, Inc.*, 390 *U.S.* 400 (1968) 10, 13, 20

O'Shea v. *Littleton*, 414 *U.S.* 488 (1974) 16

Rizzo v. *Goode*, 423 *U.S.* 362 (1976) 15

PAGE

Singer v. *State*, 95 *N.J.* 487, 472 *A.*2d 138 (1984) 1, 8, 12

State v. *Baird*, 50 *N.J.* 376, 235 *A.*2d 673 (1977) 18

Staten v. *Housing Auth. of Pittsburgh*, 638 *F.*2d 599 (3rd Cir. 1980) 21

Supreme Court of Virginia v. *Consumers Union of U.S., Inc.*, 446 *U.S.* 719 (1980) (Consumers Union IV) 8, 9, 16

Supreme Court of Virginia v. *Consumers Union of U.S., Inc.*, —— *U.S.* ——, 103 *S.Ct.* 3124 (1983) (Consumers Union VIII) 8, 18

Virginia State Bar v. *Consumers Union of U.S., Inc.*, —— *U.S* .——, 103 *S.Ct.* 3124 (1983) (Consumers Union VII) 8, 17, 18

Statutes Cited

STATE:

N.J.S.A. Cited

N.J.S.A. 2A:16-50 *et seq.* 18

N.J.S.A. 5:12-1 *et seq.* 5

N.J.S.A. 5:12-1.b(6) 5

N.J.S.A. 52:13D 4

N.J.S.A. 52:13D-12 *et seq.* 3

N.J.S.A. 52:13D-13(e) 3

N.J.S.A. 52:13D-16(b) 4

N.J.S.A. 52:13D-17.1 4

N.J.S.A. 52:13D-21(i) 4

PAGE

Chapter Laws Cited

L. 1980, *c.* 28 ..... 4, 5

L. 1980, *c.* 69 ..... 4, 5

L. 1980, c. 79 ..... 4-6, 9, 15, 18, 20, 22

L. 1980, *c.* 79, §2.e 4

L. 1980, *c.* 159 4

L. 1981, *c.* 142 6

Federal

28 *U.S.C.* §1257(3) 2

28 *U.S.C.* §2201 ..... 3, 23

28 *U.S.C.* §§2201 and 2202 ..... 11, 18

42 *U.S.C.* §1983 ..... i, 2, 3, 6, 7, 9, 10, 12-16, 18-20, 22

42 *U.S.C.* §1988 ..... i, 2, 3, 7-13, 16, 18-20, 22, 23

United States Constitution Cited

First Amendment 6

Fourteenth Amendment 6, 12, 14, 20

Congressional Reports

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 21

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 11, 13, 14

PAGE

Miscellaneous

N.J. Senate Bill 1068 (1980) 4, 5
N.J. Senate Bill 1069 (1980) 5
U.S. Senate Bill 2278 (1976) 12
U.S. House of Representatives Bill 9552 (1976) 12
Veto Message to N.J. Senate Bill 1369 (1980) 5

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

MARIJANE SINGER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Opinions Below

The opinion of the Supreme Court of New Jersey was decided March 19, 1984 and is reported as *Singer* v. *State*, 95 *N.J.* 487, 472 *A.*2d 138 (1984); it is reproduced as Appendix M (A93 to A109). The opinion of the Appellate Division of the Superior Court of New Jersey decided June 1, 1982 is unreported; it is reproduced as Appendix L (A88 to A92). The oral opinion of the Law Division of the Superior Court of New Jersey decided November 25, 1980 is also unreported; it is reproduced as Appendix J (A78 to A84).

Jurisdiction

The decision of the Supreme Court of New Jersey was entered March 19, 1984 (Appendix M, A93 to A109). This Petition for *Certiorari* is being filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 *U.S.C.* §1257 (3).

Statutes Involved

The "Civil Rights Attorney's Fees Awards Act of 1976," codified at 42 *U.S.C.* §1988, provides in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 *U.S.C.* §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 *U.S.C.* §2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Statement of the Case

This case concerns an application for attorneys' fees under 42 *U.S.C.* §1988 of over $180,000. These fees were allegedly incurred by plaintiffs in obtaining a summary judgment without discovery or an evidentiary hearing in a declaratory judgment suit attacking the constitutionality of a New Jeresy State statute. Relief was premised, in part, on 42 *U.S.C.* §1983, which prohibits certain action under color of State law. The only action complained of here, however, was the adoption of the challenged statute by the New Jersey Legislature. The actual named State defendants neither took nor threatened to take any action to enforce the statute against plaintiffs or anyone else.

On August 29, 1980, plaintiff Marijane Singer and ten other individuals who were or had been "special State officers or employees," *N.J.S.A.* 53:13D-13(e), within the meaning of the New Jersey Conflicts of Interest Law, *N.J.S.A.* 52:13D-12 *et seq.*, filed a seven-count Complaint (Appendix G; A46 to A69) challenging the validity of

L. 1980, *c.* 79 (Appendix A; A1 to A4), commonly known as the casino ethics amendment, which imposed restrictions on the business activities and financial interests of special State officers or employees with respect to casino licenses or applicants. *L.* 1980, *c.* 79 (then Senate Bill 1068 of 1980)(Appendix A; A1 to A4) amended *N.J.S.A.* 52:13D to provide that no special State officer or employee shall accept employment with any casino licensee or applicant for a casino license. This prohibition extended for a period of two years after the termination of State service. *N.J.S.A.* 52:13D-17.1. The restrictions extended to any partnership, firm or corporation with which a special State officers was associated and all partners, officers and employees of such entities. *N.J.S.A.* 52:13D-16(b).

Persons found gulity of violating the Act were subject in proceedings before defendant Executive Commission on Ethical Standards to prosecution for a fine of between $100 and $500, suspension from public service, *N.J.S.A.* 52:13D-21(i) (Appendix B; A5 to A7), and/or prosecution as a disorderly person. *L.* 1980, *c.* 79, §2.e (A4).

The passage of *c.* 79 was part of a comprehensive reform of the casino gaming industry that took place in New Jersey in 1980 following the Abscam revelations in the spring of that year linking several New Jersey public officials to illegal efforts to influence the State's supervision over casino gambling.* The Legislature's adoption of *c.* 79 placing restrictions on the activities of special State officers was in pursuance of fulfilling its earlier declaration that

---

* Also passed into law were *L.* 1980, *c.* 28 (reconstituting the Casino Control Commission as a full-time body) (Appendix D; A12 to A29); *L.* 1980, *c.* 69 (placing prohibitions on the outside employment of Commission members) (Appendix E; A30 to A41); *L.* 1980, *c.* 159 (regulating junkets and complimentary casino services) (Appendix F; A42 to A45).

> An integral and essential element of the regulation and control of such casino facilities by the State rests in public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. ["Casino Control Act," *N.J. S.A.* 5:12-1 *et seq.*, 5:12-1.b(6)]

Defendant former Governor Brendan T. Byrne allowed *c.* 79 to become law without his signature on July 29, 1980. At the time he publicly expressd his doubts regarding the constitutionality of the Act, particularly about its overbreadth (A9). Nevertheless, the Governor was not in a position to veto Senate Bill 1068. *L.* 1980, *c.* 28 (Appendix D; A12 to A29), which had been approved May 20, 1980, was a central element of casino regulation reform; it reconstituted a part-time Casino Control Commission into a fulltime body owing no allegiance to anyone but the public. However, the Legislature made the effectiveness of this linchpin of casino reform contingent upon the adoption into law of Senate Bill 1068 (later *c.* 79) and Senate Bill 1069 (subsequently *L.* 1980, *c.* 69, a law placing prohibitions on the outside employment of Casino Control Commission members) (Appendix E; A30 to A41; §5.a, A41). Thus, Governor Byrne allowed Senate Bill 1068 to become law as *c.* 79 because "only by its enactment could the reform of Casino Control Commission into a full-time body take effect." Veto Message to Senate Bill 1369 (1980) (Appendix C; A9).

At the time *c.* 79 became law, Governor Byrne warned that its provisions would discourage volunteer service on many State boards and commissions (A9). Subsequently, as Governor Byrne feared, some 180 special State officers did resign their positions to avoid the impact of *c.* 79 (A9). He promised to reappoint those who resigned upon the passage of supplemental legislation, and he continued

to press for a legislative revision. A revised casino ethics bill become law on May 14, 1981. *L.* 1981, *c.* 142. Governor Byrne fulfilled his previous promise and offered to reappoint those persons who had resigned because of the adoption of *c.* 79.

The Complaint (Appendix G; A46 to A69) challenging *c.* 79 named as defendants the State of New Jersey, Governor Byrne, the Department of Law and Public Safety, the Attorney General, the Executive Commission on Ethical Standards and six individual members of the Commission, and sought as relief a judgment declaring *L.* 1980, *c.* 79 unconstitutional, an injunction barring its enforcement, damages and costs. Counts I through II and III through IV were based, respectively, on alleged violations of federal and State constitutional law. Count VII presented a breach of contract claim.

Requested relief based on 42 *U.S.C.* §1983 was asked against the individual defendants in Counts V and VI (A65 to A67). The allegations in those two counts asserted that the passage of the casino ethics amendment deprived plaintiffs of federal constitutional rights guaranteed to them under the First and Fourteenth Amendments. For example, most of the allegations in Counts V and VI, based on §1983, commence as follows: "The Act has violated and continues to violate the following rights . . ." (A52); "The Act constitutes a bill of attainder" (A53); "The Act impairs the obligations of . . . contract" (A54); and "The Act has had direct, immediate, irreparable, substantial and damaging effects" (A54). There is no allegation to be found anywhere in Count V or Count VI, however, asserting that any of the defendants ever took or threatened to take any action to enforce the provisions of *L.* 1980, *c.* 79. Defendants' Answer specifically denied any action on their part (Appendix I; A72 to A77, A80).

In an oral opinion rendered November 25, 1980 (Appendix J; A78 to A84) in response to cross-motions for summary judgment, the Hon. George Y. Schoch, Judge, Superior Court, granted the declaratory and injunctive relief sought by Counts I through IV on the ground that the statute was overbroad, ambiguous and not rationally related to any legitimate governmental interest insofar as it affected special State officers or employees (A78 to A84). However, the court denied the claim for damages and granted final summary judgment for defendants on the §1983 claims contained in Counts V and VI and in the Count VII contract claims. *Ibid.* The court also denied plaintiffs' subsequent motion for attorneys' fees pursuant to 42 *U.S.C.* §1988 ,which provides that the court may, in its discretion, award reasonable attorney's fees to a prevailing party in any suit to enforce 42 *U.S.C.* §1983.

Thereafter, appellants filed a Notice of Appeal to the Appellate Division, Superior Court, from the trial court's entry of judgment for defendants as to Counts V and VI under §1983 and its denial of attorneys' fees under §1988. The State defendants did not appeal the declaration of invalidity on federal constitutional grounds of *c.* 79.

The Appellate Division issued its decision in this matter on June 1, 1982, and reversed the trial court insofar as Judge Schoch concluded that defendants were entitled to summary judgment on the Counts V and VI §1983 claims and insofar as he denied plaintiffs' application for attorneys' fees under §1988 (Appendix L; A88 to A92). The appellate panel held that the existence of a violation of the Fourteenth Amendment was synonymous with a violation of 42 *U.S.C.* §1983 (A89 to A90). Accordingly, it also determined that an attorneys' fee award under 42 *U.S.C.* §1988 could be awarded against the defendants (A90).

Thereafter, the Supreme Court of New Jersey granted defendants' Petition for Certification and issued its opin-

ion in this matter on March 19, 1984. *Singer* v. *State*, 95 *N.J.* 487, 472 *A.*2d 138 (1984) (Appendix M; A93 to A109). The Supreme Court, relying on this Court's decision in *Supreme Court of Virginia* v. *Consumers Union, Inc.*, 446 *U.S.* 719 (1980),* held that the existence of enforcement authority, coupled with the duty to enforce, was a sufficient basis upon which to award attorney's fees under 42 *U.S.C.* §1988. *Singer* v. *State*, 95 *N.J.* at 493-494, 472 *A.*2d at 141 (A99). The Supreme Court, like the Appellate Division, equated a declaration of invalidity on federal constitutional grounds with success under §1983. Said the court: "Even without succeeding on their section 1983 claim, plaintiffs obtained substantially all of the relief they sought." *Id.*, 95 *N.J.* at 496, 472 *A.*2d at 142 (A102).

The court remanded the matter to the trial court for a determination of reasonable attorney's fees under §1988. *Id.*, 95 *N.J.* at 501-502, 472 *A.*2d at 145 (A108).

---

* The initial decision of the three-judge court in this matter is reported at *Consumers Union of U.S., Inc.* v. *American Bar Ass'n*, 427 *F. Supp.* 506 (E.D. Va. 1976) (Consumers Union I); this Court vacated that judgment at *Consumers Union of U.S., Inc.* v. *Virginia State Bar*, 433 *U.S.* 917 (1977) (Consumers Union II); on remand the three-judge court assessed attorney's fees at *Consumers Union of U.S., Inc.* v. *American Bar Ass'n*, 470 *F. Supp.* 1055 (E.D. Va. 1979) (Consumers Union III); this Court vacated and remanded at *Supreme Court of Virginia* v. *Consumers Union, Inc.*, 446 *U.S.* 719 (1980) (Consumers Union IV); on remand the three-judge panel assessed fees in part at *Consumers Union of U.S., Inc.* v *.American Bar Ass'n.*, 505 *F. Supp.* 822 (E.D. Va. 1981) (Consumers Union V); that decision was modified on appeal at *Consumers Union of U.S., Inc.* v. *Virginia State Bar*, 688 *F.*2d 218 (4th Cir. 1982) (Consumers Union VI); this Court denied *certiorari* at *Virginia State Bar* v. *Consumers Union of U.S., Inc.*, —— *U.S.* ——, 103 *S.Ct.* 3124 (1983) (Consumers Union VII); Chief Justice Burger and Justice Rehnquist dissented from the denial of *certiorari* at *Supreme Court of Virginia* v. *Consumers Union of U.S., Inc.*, —— *U.S.* ——, 103 *S.Ct.* 3124 (1983) (Consumers Union VIII).

ARGUMENT

The Court should grant certiorari to settle the unresolved issue of whether attorney's fees may be awarded under 42 *U.S.C.* §1988 even though none of the defendants took or threatened to take any action to enfore *L.* 1980, *c.* 79 which would subject them to liability under 42 *U.S.C.* §1983; also, attorney's fees should be denied in this case because there are "special circumstances" which would render an award of fees "unjust".

This case is of major significance because it raises the unique issue of whether attorney's fees may be awarded under 42 *U.S.C.* §1988 to plaintiffs who, although successfully pursuing a declaratory judgment action clarifying the validity of a State of New Jersey statute, were never subjected to an enforcement action under the statute or even threatened with one. The resolution of this issue is of great importance to the State of New Jersey and its officials because they are routinely named as nominal defendants in lawsuits challenging a statute despite their passive stance in enforcing the statute. The logical defendants in such actions attacking the mere passage of a statute are the individual legislators who adopted it. They, however, possess absolute immunity from suit, including an award of attorney's fees. *Consumers Union IV, supra,* 446 *U.S.* 719.

Exposure of the State, and its non-legislative officers to counsel fee awards in every declaratory judgment action decided on a federal constitutional basis, but incapable of supporting a §1983 claim for relief because the requirement of State enforcement action goes unfulfilled, would subject the State treasury to a substantial financial drain. Moreover, this would impose liability in circumstances

specifically considered and rejected by Congress when it passed the "Civil Rights Attorney's Fees Awards Act of 1976" as an amendment to 42 *U.S.C.* §1988. In addition, this case presents the Court with the opportunity to address when an award of attorneys' fees should be precluded or reduced, if ever, for reasons of "special circumstances." For all of these reasons, amplified below, this case warrants that *certiorari* be granted.

A. Plaintiffs are not entitled to an award of attorney's fees under 42 *U.S.C.* §1988 because they have not met the prerequisites for obtaining relief under any of the civil rights statutes listed in 42 *U.S.C.* §*1988, specifically* 42 *U.S.C.* §1983, which entitles a prevailing party to an award of attorney's fees.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 *U.S.* 240 (1975), this Court held that federal courts did not have the power to award attorney's fees to a prevailing party unless expressly provided for by statute. The Court reversed an award of fees to plaintiffs who had succeeded in litigation preventing construction of the Alaskan pipeline because of environmental damage, citing the "American Rule" that each litigant, whatever the outcome, must pay his own attorney's fees. Although the *Alyeska* case involved an environmental matter, it had the effect of precluding fee awards in a wide-range of matters, including civil rights cases, whenever there was no express statutory authorization for attorney's fee awards. *Id.,* 421 *U.S.* at 270, n. 46. Prior to the *Alyeska* decision, federal courts had been awarding attorney's fees to prevailing plaintiffs in civil rights cases under an equitable theory that when plaintiffs succeeded in eliminating discriminatory practices they were acting as "private attorneys general." *See Newman* v. *Piggie Park Enterprises, Inc.,* 390 *U.S.* 400, 402 (1968). In *Alyeska,* the

Court rejected that theory as a basis for fee awards in the absence of express statutory authorization.

In the aftermath of *Alyeska,* Congress adopted the "Civil Rights Attorney's Fees Awards Act of 1976." It provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [42 *U.S.C.* §1988]

The express language of the statute makes it clear that attorney's fee awards are limited to actions grounded on the specific sections of the United State code enumerated in the Act. It is thus important with respect to this case to note that among the provisions of the United States Code not listed in §1988 are 28 *U.S.C.* §2201 and §2202 which provide for declaratory judgment proceedings. The legislative history of the Act also clearly distinguishes between actions based on violations of the federal Constitution, for which fees cannot be awarded, and actions premised on the listed United States Code sections, including §1983, which will support a fee award to a prevailing plaintiff. The House of Representatives Report No. 94-1558 (Appendix O; A122 to A142) recites that the House considered three different bills to provide for attorney's fee awards in civil rights cases:

> At the time of the Subcommittee hearings on October 6 and 8, and Dec. 3, 1975, three bills were pending which dealt expressly with counsel fees in civil rights cases: H.R. 7828 (same as H.R. 8220); H.R. 7969 (same as H.R. 8742); and H.R. 9552.

> H.R. 7828 and H.R. 9552 would allow attorney fees to be awarded in cases brought under specific provisions of the United States Code, while H.R. 7969 would permit such awards in any case involving civil or constitutional rights, no matter what the source of the claim. H.R. 7828 was stated in mandatory terms; H.R. 9552 and H.R. 7969 allowed discretionary awards. [H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976) (A126)]

The Congress, significantly, never acted on the version that would have allowed fees in any case, whether based on Constitution or United States Code provision. Instead, the Congress adopted S. 2278 (a successor bill to H.R. 9552), now embodied in §1988, which permits fee awards only in cases brought under the specific sections of the United States Code listed therein.

The Supreme Court of New Jersey erroneously concluded that because plaintiffs succeeded in invalidating the casino ethics amendment on a federal constitutional ground, *i.e.* the Fourteenth Amendment, they were likewise entitled to a judgment in their favor on Counts V and VI of their Complaint seeking relief pursuant to §1983. *Singer* v. *State, supra.* Having so concluded, the court then decided attorney's fees could be awarded under §1988. The court, however, failed to address the fact that none of the defendants either took or threatened plaintiffs with any enforcement action under the statute that would be supportive of a §1983 remedy. In fact, the Complaint itself does not challenge any action taken pursuant to the statute, but simply questions the existence of the statute itself.

As the legislative history makes clear, however, it is essential that before awarding fees under §1988, a court must determine that one of the code sections enumerated

in §1988 has been violated. This inquiry has become necessary only after the decision in *Alyeska* because prior to that time, as noted above, fees were awarded under the equitable theory of "private attorneys general." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 *U.S.* at 402. Thus it was simply not necessary to pinpoint whether the basis for awarding fees stemmed from a constitutional or a statutory violation. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4, n. 7 (1976) (Appendix O; A128). *Maine* v. *Thiboutot*, 448 *U.S.* 1, 10, n. 10 (1980). The adoption of §1988 has, however, made such a determination critical.

Thus, while a favorable judgment on a §1983 claim will not always be necessary to support a fee award, that rule applies only when the court does not decide the merits of the §1983 claim but the plaintiff otherwise obtains substantiallly all the relief sought by way of settlement or by resolution of the case in a manner which avoids determination of the constitutional issue presented by the §1983 claim. *Maher* v. *Gagne*, 448 *U.S.* 122 (1980). In this case, however, the trial court did not avoid resolution of the constitutional issue by deciding the case on a non-§1983 ground. The trial court faced the constitutional grounds, and decided them in plaintiffs' favor, but it rendered an adverse judgment on the §1983 counts. Under such circumstances, where the §1983 claim has been specifically considered and rejected by the court, there is no basis to award fees. *Luria Brothers & Co., Inc.* v. *Allen*, 672 *F.*2d 347 (3rd Cir. 1982). The court in *Luria Brothers* stated the issue as follows:

> Here the district court did reach both the federal constitutional question and the related state law question, and here we have concluded that the claimant of the attorney's fees has not prevailed in the §1983 claim. Thus, the question reduces itself to one of statutory construction: if, as a result of an

> adjudication, one is the losing and not the prevailing party on a §1983 claim, may he be entitled nevertheless to attorney's fees on the strength of his success on a related state law claim? We do not think so. [*Id.*, 672 *F.*2d at 357]

In *Luria Brothers,* plaintiffs prevailed on their state law claim. In this case, plaintiffs prevailed on their federal constitutional claim. As the legislative history to §1988 makes clear, however, that is not the critical factor. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4, n. 7 (1976) (Appendix O; A128). *Maine* v. *Thiboutot,* 448 *U.S.* at 10, n. 10. What is determinative of the fees question is that the plaintiffs in each case lost on their §1983 claims. Here, the trial court correctly concluded that plaintiffs were not entitled to judgment on their §1983 counts. The New Jersey Supreme Court was in error when it equated a violation of the Fourteenth Amendment with a violation of §1983.

42 *U.S.C.* §1983 provides in pertinent part that:

> Every person who, under color of any statute . . . of any State . . . *subjects, or causes to be subjected,* and citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (emphasis added)

Two elements must be satisfied in a §1983 action. First, there must be a showing by plaintiffs of a deprivation of a right secured by the federal Constitution or laws. Secondly, there must be *action* by the defendants under color of state law. *Flagg Brothers, Inc.* v. *Brooks,* 436 *U.S.* 149 (1978); *Adickes* v. *S.H. Kress and Company,* 398

U.S. 144 (1970). The action requirement contained in §1983, passed after the Civil War to protect against coercive acts of state government officials, creates in effect a "constitutional tort." *Monell* v. *Department of Social Services,* 436 *U.S.* 658 (1978); *Imbler* v. *Pachtman,* 424 *U.S.* 409 (1976). Since §1983 is premised on principles of tort law, liability can only be established when there has been personal involvement with knowledge and pursuant to the challenged statute. *Adickes* v. *S.H. Kress and Company,* 398 *U.S.* at 162, n. 23; *Monroe* v. *Pape,* 365 *U.S.* 167 (1961). Consequently, it is the requirement of wrongful *action* as a predicate to liability that precludes the application of principles of respondeat superior or vicarious liability in §1983 lawsuits. *Rizzo* v. *Goode,* 423 *U.S.* 362 (1976).

In this matter, it is clear that none of the named defendants ever engaged in any acts which would subject them to liability under §1983. The Governor allowed *L.* 1980, *c.* 79 to become law without his signature and publicly expressed his doubts about *c.* 79's constitutionality (A9). He only allowed *c.* 79 to become law because its enactment was a condition precedent to the effectiveness of a law establishing the essential reform of a full-time Casino Control Commission. The Attorney General never took nor threatened to take any steps to enforce the provisions of the casino ethics amendment against plaintiffs. Nor did the members of the Executive Commission on Ethical Standards engage in any activity that could be characterized as an act, or threatened act of enforcement. Moreover, plaintiffs never even alleged in their Complaint (Appendix G; A46 to A69) that the defendants acted, or intended to act adversely to them. Nor did they seek any temporary restraints against *c.* 79's enforcement for the nearly four months between the time *c.* 79 became law and the time it was declared unconstitutional by the trial court.

Indeed, every allegation contained in the §1983 Counts V and VI of plaintiffs' Complaint is concerned not with acts committed by the defendants but by harm asserted to flow directly from the adoption of the casino ethics amendment. Their real complaint thus challenges nothing more than the existence of the statute itself.

Furthermore, the mere existence of enforcement authority, unexercised or unthreatened, is not enough to sustain a §1983 claim for purposes of an attorney's fees award. Indeed, enforcement authority alone and unexercised has been held to be insufficient to create a case or controversy under §1983. *O'Shea* v. *Littleton,* 414 *U.S.* 488 (1974); *Boyle* v. *Landry,* 401 *U.S.* 77 (1971). *See Consumers Union IV,* 446 *U.S.* at 736, n. 15. *Accord Gras* v. *Stevens,* 415 *F.Supp.* 1148 (S.D. N.Y. 1976) (general duty of Governor and Attorney General to enforce state law doesn't confer §1983 jurisdiction); *Fialkowski* v. *Shapp,* 405 *F.Supp.* 946 (E.D. Pa. 1975) (mere allegation the Attorney General had duty to enforce law warranted dismissal of suit). If enforcement authority alone cannot meet basic jurisdictional prerequisites for a §1983 claim, then it must be perforce conceded that the existence of mere enforcement authority may not sustain a §1983 claim for purposes of an award of attorney's fees under §1988.

In *Consumers Union VI, supra,* 688 *F.*2d 218, the Fourth Circuit did not hold that mere enforcement authority alone is sufficient to create a case or controversy under §1983 and to sustain a fee award. Rather, the Circuit relied upon the earlier language in this Supreme Court's decision indicating that the Virginia Supreme Court had conceded its liability under §1983 and therefore provided the basis for a fee award against it.

This view of the Fourth Circuit's ruling is buttressed by the memorandum decision filed by Chief Justice Burger and joined by Justice Rehnquist dissenting from the denial of *certiorari, supra,* —— *U.S.* ——, 103 *S.Ct.* 3124. They observed:

> We held in *Consumers Union* that the Virginia Court was a proper defendant in a coercive §1983 suit because it had the potential power to prosecute attorneys for disciplinary violations. However, there was no evidence in the record that it had ever exercised its enforcement powers. After vacating the award because it was premised on acts—the promulgation and failure to amend the challenged disciplinary rules—for which the Virginia Court was entitled to absolute legislative immunity, we remanded the case. If we had thought that the mere existence of enforcement authority would support the award, there would have been no need to remand as to the Virginia Court. Thus, we necessarily remanded for further findings on the Virginia Court's actual exercise of its enforcement powers, and for consideration of whether such acts justified a fee award against the court.
>
> On remand, the District Court took no evidence as to the Virigina Court's actual role in enforcing the challenged rule; in reinstating the award, it relied solely on the mere existence of disciplinary authority. 505 *F.Supp.,* at 823-824. In short, the fee award rests on the same basis now—the Virginia Court's promulgation of disciplinary rules—that it did before. The District Court's reliance on the Virginia Court's potential 'disciplinary enforcement authority' cannot cover up the utter lack of proof in the record that the Virginia Court ever did anything to enforce the rule. Thus, the fee award cannot stand.

> For all the foregoing reasons, I would grant *certiorari* to consider the important question of whether an award of attorney's fees against a judge may be premised solely on the existence of enforcement authority. [*Id.*, —— *U.S.* ——, 103 *S.Ct.* at 3127]

Since all of the named defendants herein assumed a passive stance with respect to enforcing *L.* 1980, *c.* 79, and thus did not engage in any action against plaintiffs, it was erroneous for the Supreme Court of New Jersey to find liability against the defendants under §1983. The fact of the matter is that the State officials charged here were just as concerned as plaintiffs in having the legal status of *L.* 1980, *c.* 79 clarified. The traditional and appropriate procedure to construe the validity of a statute is to obtain a declaratory judgment and, when appropriate, an injunction enforcing that declaration. 28 *U.S.C.* §§2201 and 2202; *N.J.S.A.* 2A:16-50 *et seq.* In fact, the New Jersey Supreme Court has consistently expressed its preference that the appropriate way to challenge the constitutionality of a statute is by a suit for declaratory judgment and not by inviting a civil or criminal prosecution. *State* v. *Baird*, 50 *N.J.* 376, 378-379, 235 *A.*2d 673, 674 (1967); *Lucky Calendar Co.* v. *Cohen*, 19 *N.J.* 399, 408-409, 117 *A.*2d 487, 492 (1955).

Such actions allow the adjudication of legal rights and duties without the need to resort to coercive State action necessitating a prior breach or a violation of a constitutional right. It is for this reason that it is significant that Congress omitted the federal declaratory judgment provisions, 28 *U.S.C.* §§2201 and 2202, from the list of code sections enumerated in §1988 for which counsel fees could be awarded. Plainly, Congress did not intend attorney's fees to be awarded in cases where governmental officials never acted adversely to prevailing plaintiffs, even

where the challenged statute is struck down on federal constitutional grounds. *See Maine* v. *Thiboutot,* 448 *U.S.* at 5-6 (recognizing that constitutional claims are distinct from a §1983 claim). This is logical since until the state officials act, or threaten action, there is no harm.

If the New Jersey Supreme Court decision in this matter is allowed to stand, it will convert every declaratory judgment action decided on federal constitutional grounds into a §1983 action with accompanying counsel fee awards under §1988. Such lawsuits are frequent and routine and have the potential of placing a severe drain on the State's limited financial resources. In addition such a rule could have a severe and detrimental impact on State officers. The present policy of the State of New Jersey is, generally, to indemnify State officers against §1983 judgments. However, the §1983 judgments usually run against the individual defendant who, most often, is sued in both his official and individual capacity. The degree of indemnification depends on the availability of State funds. In the event State funds are insufficient, the State officer would be individually and personally liable for the unsatisfied judgment. Under the State Supreme Court's decision, such an individual would find himself liable for an award of attorney's fees even though he had not taken or threatened any action against plaintiffs. The State officer would be held financially accountable simply by virtue of holding a particular State office. Such a result would be plainly contrary to the requirement of personal involvement fundamental to a §1983 claim.

As noted above, Congress considered and rejected an approach that would have permitted fee awards in civil rights cases for violations of both the federal Constitution and statutory provisions. Instead, it adopted a fees act that permits counsel fee awards only in cases grounded on the specific United States Code sections listed in §1988.

Congress specifically included §1983-based claims, but a successful §1983 claim contains as one of its two elements a requirement of State action. That prong was not satisfied in this case. As this Court has observed:

> Where . . . a federal right is at issue, the statutory concept of action under color of state law [in §1983] would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right. [*Lugar* v. *Edmondson Oil Co., Inc.*, 457 *U.S.* 922, 935, n. 18 (1982)]

Congress also pointedly did not include declaratory judgment actions within the ambit of §1988. That is the type of case presented here. Accordingly, the New Jersey Supreme Court erred when it treated the declaration of invalidity of *c.* 79 in violation of the Fourteenth Amendment as the equivalent of a cause of action under §1983. They are clearly different, and it is essential to explore that distinction when considering fee awards under §1988. This Court should grant *certiorari* to settle these unresolved issues.

B. "Special Circumstances" would render an award of attorney's fees in this case "unjust" since the State defendants did not take action or threaten to enforce the challenged State law and since no such action was even alleged in plaintiffs' complaint.

Although under §1988 reasonable attorney's fees should ordinarily be awarded to the prevailing party, it has been held that a counsel fee award may nevertheless be properly denied whenever "special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 *U.S.* 400, 402 (1968). That standard was incorporated in the legislative history of the Fees Act,

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5912 (Appendix N; A117), and has since been reiterated by this Court. *Hensley* v. *Eckerhart*, —— *U.S.* ——, 103 *S.Ct.* 1933, 1937, 76 *L.Ed.* 2d 40 (1983).

Subsequent judicial interpretation of the "special circumstances" doctrine, however, has narrowly circumscribed its application so that it is devoid of any real meaning. Although some courts have invoked "special circumstances" to preclude an award of attorneys' fees, *Chastang* v. *Flynn & Emrich Co.*, 541 *F.*2d 1040, 1045 (4th Cir. 1976); *Naprstek* v. *City of Norwich*, 433 *F.Supp.* 1369 (N.D. N.Y. 1977), the overwhelming majority have rejected most arguments advanced as special circumstances. *See Konczak* v. *Tyrrell*, 603 *F.*2d 13, 19 (7th Cir. 1979), *cert. denied* 444 *U.S.* 1016 (1980) (that litigation benefited only named plaintiffs and not a larger class); *Coop* v. *City of South Bend*, 635 *F.*2d 652 (7th Cir. 1980) (that plaintiffs won only nominal damages); *Staten* v. *Housing Auth. of Pittsburgh*, 638 *F.*2d 599 (3rd Cir. 1980) (that plaintiff's case was simple); *Coop* v. *City of South Bend*, 635 *F.*2d at 655 (that plaintiff declined to settle); *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 *F.*2d 497 (7th Cir. 1980) (that governmental defendant is financially troubled); *Criterion Club of Albany* v. *Board of Comm'rs.*, 594 *F.*2d 118, 120 (5th Cir. 1979) (that most of the fee request was for time spent on fee issue itself). And in *Consumers Union VI*, the Fourth Circuit modified the judgment of the three-judge panel which had held that "special circumstances" made an award of fees against the Virginia State Bar "unjust" and awarded fees. *Id.*, 688 *F.*2d at 221-222.

It would thus be appropriate and helpful for this Court to address what constitutes "special circumstances" in a particular case and whether that doctrine has any continuing validity. For example, in this matter the Court

should consider, if it determines that a fee award may be made, that the defendants uniformly took a passive stance with respect to enforcing the challenged statute, that the Governor publicly declared his doubts about *c.* 79's unconstitutionality and that the defendants at all times acted in good faith. It should consider that the passage of *c.* 79 was a condition precedent to the creation of a full-time Casino Control Commission. Another factor to be weighed is that the real act complained of is the passage of the statute itself, something outside the control of the defendants and an action normally entitled to absolute legislative immunity. (The Governor's review of bills passed by the State Legislature is likewise a legislative function. *Gilbert* v. *Gladden,* 87 *N.J.* 275, 432 *A.*2d 1351 (1981)). In addition, it is important that in this case plaintiffs initiated this lawsuit to clarify their right to hold appointed political offices which they have no liberty, property or other constitutional interest to occupy.

CONCLUSION

Certiorari should be granted because the Supreme Court of New Jersey erroneously concluded that attorney's fees could be awarded in this case under §1988. This conclusion is wrong because it is premised on the notion that the finding of a federal constitutional violation invalidating the challenged statute is equivalent to satisfying a cause of action under §1983 supportive of a fee application under §1988. This is not so, however, because to establish a successful claim under §1983 it is necessary to show that the defendants engaged in conduct harmful to plaintiffs. In fact, defendants neither took nor threatened any action against plaintiffs. Nor does plaintiffs' Complaint even allege any wrongful action by defendants. Plaintiffs'

Complaint asserted harm flowing solely from the adoption of the challenged statute by the State Legislature. If fees were awarded in this case, it would subject the State, and possibly the individually named defendants, to substantial financial liability. This result would be contrary to the intention of Congress when it adopted the "Civil Rights Attorney's Fees Awards Act of 1976." The legislative history demonstrates Congress intended counsel fees to be awarded only for actions based on the United States Code sections enumerated in §1988, and it did not include §2201 (declaratory judgment proceedings) in that list.

For the foregoing reasons, it is submitted that this Court should grant a writ of *certiorari* to review and ultimately reverse the decision of the Supreme Court of New Jersey in this matter.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioners

MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

WILLIAM HARLA
Deputy Attorney General
On the Petition

Dated: June 14, 1984

NO.

Office - Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS,
CLERK

83-2071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Petitioners,

v.

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER and MAGDA S. LEUCHTER,

Respondents.

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioners, State of New Jersey; Brendan T. Byrne as Governor of the State of New Jersey; Department of Law and Public Safety; John J. Degnan as Attorney General of the State of New Jersey; Executive Commission on Ethical Standards; Angelo Bianchi, Richard Mount, Warren Smith, Jacob Taporek, Edward Hofgesang and Joan Haberle as members of the Excutive Commission on Ethical Standards
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-4965

MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

WILLIAM HARLA
Deputy Attorney General
On the Petition

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

145pp

TABLE OF CONTENTS

	PAGE
A—*L.* 1980, *c.* 79 of New Jersey	1a
B—*N.J.S.A.* 52:13D-21	5a
C—Veto Message to Senate Bill 1369 (1980), dated November 24, 1980	8a
D—*L.* 1980, *c.* 28	12a
E—*L.* 1980, *c.* 69	30a
F—*L.* 1980, *c.* 159	42a
G—Plaintiffs' Complaint Filed August 29, 1980 in the Superior Court of New Jersey	46a
H—Plaintiffs' Amended Complaint Filed September 25, 1980 in the Superior Court of New Jersey	70a
I—Defendants' Answer Filed October 17, 1980	72a
J—Oral Opinion of the Hon. George Y. Schoch, Judge, Superior Court, Issued November 25, 1980	78a
K—Order Granting Summary Judgment Filed January 16, 1981	85a
L—Opinion of the Appellate Division, Superior Court Filed June 1, 1982	88a

PAGE

M—Opinion of the New Jersey Supreme Court Decided March 19, 1984 ..... 93a

N—S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ..... 110a

O—H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 122a

APPENDIX A

L. 1980, *c. 79* of New Jersey

CONFLICTS OF INTEREST LAW—REPRESENTATION OF CASINOS AND LICENSE APPLICANTS

CHAPTER 79

SENATE No. 1068

An Act to amend and supplement the "New Jersey Conflicts of Interest Law," approved June 2, 1971 (P.L. 1971, c. 182).

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 5 of P.L. 1971, c. 182 (C. 52:13D-16)[95] is amended to read as follows:

a. No special State officer or employee, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before the particular office, bureau, board, council, commission, authority, agency, fund or system in which such special State officer or employee holds office or employment.

---

[95] N.J.S.A. 52:13D-16.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix A

b. No special State officer or employee shall accept employment with any holder of, or applicant for, a casino license or any holding or intermediary company with respect thereto, nor shall any special State officer or employee nor any partnership, firm or corporation with which such special State officer or employee is associated, nor any partner, officer, or employee of such partnership, firm or corporation accept employment as an agent or attorney to represent, appear for, or negotiate on behalf of any holder of, or applicant for, a casino license or any holding or intermediary company with respect thereto, in connection with any cause, application or matter.

c. No State officer or employee or member of the Legislature, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before any State agency; provided, however, this subsection shall not be deemed to prohibit a member of the Legislature from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the member of the Legislature, whether directly or indirectly nor shall anything contained herein be deemed to prohibit any such partnership, firm or corporation from appearing on its own behalf.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix A

2.[96]

a. As used in this section "person" means State officers or employees subject to disclosure by law or executive order; special State officers and employees; the Governor; any member of the Legislature or Judiciary; any member of the governing body, or the municipal attorney of a municipality wherein a casino is located; any member of or attorney for the planning board or zoning board of adjustment of a municipality wherein a casino is located, or any professional planner regularly employed by the planning board or zoning board of adjustment.

b. No person, nor any partnership, firm or corporation with which such person is associated nor any partner, officer or employee of such partnership, firm or corporation, within 2 years next subsequent to the termination of the office or employment of such person, shall acquire, directly or indirectly, more than 1% interest in, or shall accept employment with, or shall represent, appear for or negotiate on behalf of any holder of, or applicant for, a casino license, or any holding or intermediary company with respect thereto. Nothing herein contained shall alter or amend the post-employment restrictions applicable to members and employees of the Casino Control Commission and employees and agents of the Division of Gaming Enforcement pursuant to subsection b.(2) of section 59 and to section 60 of P.L. 1977, c. 110 (C. 5:12-59b.(2) and C. 5:12-60).

---

[96] N.J.S.A. 52:13D-17.1.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix A

c. No person shall solicit or accept, directly or indirectly, any complimentary service or discount from any casino applicant or licensee which he knows or has reason to know is other than a service or discount that is offered to the general public.

d. No person shall influence, or attempt to influence, by use of his official authority, the decision of the commission or the investigation of the division in any application for licensure or in any proceeding to enforce the provisions of this act or the regulations of the commission. Any such attempt shall be promptly reported to the Attorney General; provided, however, that nothing in this section shall be deemed to proscribe a request for information by any person concerning the status of any application for licensure or any proceeding to enforce the provisions of this act or the regulations of the commission.

e. Any person who willfully violates the provisions of this section is a disorderly person and shall be subject to a fine not to exceed $500.00 or imprisonment not to exceed 6 months, or both.

3.

This act shall take effect immediately.

Approved and effective July 29, 1980.

Note: Additions in text indicated by *italics*; deletions by [ ].

APPENDIX B

N.J.S.A. 52:13D-21

52:13D-21. Executive commission on ethical standards; penalties for state officers or employees found guilty by commission

(a) The Executive Commission on Ethical Standards created pursuant to P.L. 1967, chapter 229[1] is continued and established in the Department of Law and Public Safety and shall constitute the first commission under this act.

(b) The commission shall be composed of seven members appointed by the Governor from among State officers and employees serving in the Executive Branch. Each member shall serve at the pleasure of the Governor during the term of office of the Governor appointing him and until his successor is appointed and qualified. The Governor shall designate one member to serve as chairman and one member to serve as vice-chairman of the commission.

(c) Each member of the said commission shall serve without compensation but shall be entitled to be reimbursed for all actual and necessary expenses incurred in the performance of his duties.

(d) The Attorney General shall act as legal adviser and counsel to the said commission. He shall upon request advise the commission in the rendering of advisory opinions by the commission, in the approval and review of

---

[1] Sections 52:13D-1 to 52:13D-11 repealed.

Note: Additions in text indicated by *italics*; deletions by [ ].

codes of ethics adopted by State agencies in the Executive Branch and in the recommendation of revisions in codes of ethics or legislation relating to the conduct of State officers and employees in the Executive Branch.

(e) The said commission may, within the limits of funds appropriated or otherwise made available to it for the purpose, employ such other professional, technical, clerical or other assistants, excepting legal counsel, and incur such expenses as may be necessary for the performance of its duties.

(f) The said commission, in order to perform its duties pursuant to the provisions of this act, shall have the power to conduct investigaions, hold hearings, compel the attendance of witnesses and the production before it of such books and papers as it may deem necessary, proper and relevant to the matter under investigation. The members of the said commission and the persons appointed by the commission for such purpose are hereby empowered to administer oaths and examine witnesses under oath.

(g) The said commission is authorized to render advisory opinions as to whether a given set of facts and circumstances would, in its opinion, constitute a violation of the provisions of this act or of a code of ethics promulgated pursuant to the provisions of this act.

(h) The said commission shall have jurisdiction to initiate, receive, hear and review complaints regarding violations, by any State officer or employee or special State officer or employee in the Executive Branch, of the pro-

---

Note: Additions in text indicated by *italics*; deletions by [ ].

visions of this act or of any code of ethics promulgated pursuant to the provisions of this act. Any complaint regarding a violation of a code of ethics may be referred by the commission for disposition in accordance with subsection 12(d) of this act.

(i) Any State officer or employee or special State officer or employee found guilty by the commission of violating any provision of this act or of a code of ethics promulgated pursuant to the provisions of this act shall be fined not less than $100.00 nor more than $500.00, which penalty may be collected in a summary proceeding pursuant to the Penalty Enforcement Law (N.J.S. 2A:58-1), and may be suspended from his office or employment by order of the commission for a period of not in excess of 1 year. If the commission finds that the conduct of such officer or employee constitutes a willful and continuous disregard of the provisions of this act or of a code of ethics promulgated pursuant to the provisions of this act, it may order such person removed from his office or employment and may further bar such person from holding any public office or employment in this State in any capacity whatsoever for a period of not exceeding 5 years from the date on which he was found guilty by the commission.

L. 1971, c. 182, § 10, eff. Jan. 11, 1972.

[1] Sections 52:13D-1 to 52:13D-11 repealed.

Note: Additions in text indicated by *italics*; deletions by [ ].

APPENDIX C

Veto Message to Senate Bill 1369 (1980) dated November 24, 1980

State of New Jersey,

Executive Department,

November 24, 1980.

SENATE BILL No. 1369 (2nd OCR)

To the Senate:

Pursuant to Article V, Section I, Paragraph 14(b) of the Constitution, I herewith return Senate Bill No. 1369 (2nd OCR) with my objections and recommendations for amendment.

This bill would amend the New Jersey Conflicts of Interest Law, in particular its revision by Chapter 79 of the Laws of 1980, which became law without my signature on July 29, 1980. Chapter 79 imposes restrictions on the relationship between special State officers, that is, the part-time members of the numerous State boards and commissions, and casino licensees, applicants or holding companies. It prohibits any special State officer or his firm from representing the latter group or accepting employment as a casino key employee. Chapter 79 also prohibits special State officers, State officers who file financial disclosure statements, members of the Legislature and Judiciary, and a number of Atlantic City officials from accepting employment with, representing or acquiring more than a 1% interest in any casino licensee, applicant or holding company for a two year-period after any of them have left public office. This prohibition extends to any partnership,

firm, or corporation with which the official becomes associated during that period.

This bill would modify these restrictions to some degree: the firms of special State officers could represent casino holding companies in non-gambling matters; the two-year restriction after public service would apply only to those State officers and special State officers who are required to file financial disclosure statements or who have responsibility for matters affecting gambling; and the two-year restriction would apply only to gambling matters.

I let Chapter 79 become law without my signature because only by its enactment could the reform of Casino Control Commission into a full-time body take effect. At that time, I criticized Chapter 79 for its overbreadth and warned that it would discourage service on the numerous volunteer State boards and commissions which have little or nothing to do with casino activity. The enactment of Chapter 79, in fact, led to the resignation of 180 special State officers and has left a number of boards and commissions unable to function for lack of a quorum. It was, in addition, overturned in part by court decision for unconstitutionally including certain municipal judges within its ambit.

This bill, while an improvement over Chapter 79, continues unfairly to include all special State officers and all professional employees of the Administrative Office of the Courts regardless of their responsibility for matters affecting casino activity. Furthermore, the bill as it has passed applies to State officers and employees who have responsibility for gambling matters not in any way related to casinos. As written, it would continue to deter

talented persons from devoting their time and effort to public service for limited periods.

All key State officials in both the executive and legislative branches, including the Governor and his staff, would be restricted by this bill. No useful purpose is served by extending those restrictions to volunteer officials or to law clerks who have no responsibility for gambling matters or by including those officials who have responsibility for gambling matters unrelated to casinos, such as the State Lottery or horse racing.

Accordingly, I am returning Senate Bill No. 1369 (2nd OCR) with recommendations for amendment which would limit those State officers, employees and special State officers subject to its restrictions to those with responsibility for matters affecting casino activity and would delete the approximately 200 law clerks and other professional employees of the Administrative Office of the Courts. It would in addition, make a technical amendment to that section permitting State officers and employees to appear in various judicial or quasijudicial proceedings which, as worded, would have conflicted with other provisions of the bill:

Page 5, Section 2, Line 42: delete "or a casino."

Page 5, Section 2, Line 43: delete "licensee or applicant therefor".

Page 6, Section 3, Line 4: delete "gambling" and insert "casino activity".

Page 6, Section 3, Line 6: delete "gambling" and insert "casino activity".

Page 6, Section 3, Line 8: delete "the".

Appendix C

Page 6, Section 3, Line 9: delete "Administrative Office of the Courts,".

Page 6, Section 3, Line 18A: delete "nor any special State officer".

Page 6, Section 3, Line 19: delete "or employee," and "as defined in this section,".

Page 6, Section 3, Line 20: delete "State officer or employee,".

Page 6, Section 3, Line 21: delete "special State officer or employee, or".

Page 6, Section 3, Line 30: delete "; nor shall any" and insert ", except as hereinafter provided. No".

Page 6, Section 3, Line 31: delete "such" and after "employee" insert "with responsibility for matters affecting casino activity".

Page 6, Section 3, Line 40: delete "gambling" and insert "casino".

Page 7, Section 3, Line 55: delete "gambling" and insert "casino".

Page 7, Section 3, Line 65: delete "gambling" and insert "casino activity".

Respectfully,

/s/ BRENDAN BYRNE,
Governor.

(SEAL)

Attest:

/s/ HAROLD L. HODES,
Chief of Staff, Secretary.

APPENDIX D

L. 1980, c. 28

CASINO CONTROL ACT—AMENDENTS
CHAPTER 28

ASSEMBLY No. 1081

An Act to amend and supplement the "Casino Control Act," approved June 2, 1977 (P.L. 1977, c. 110).

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 52 of P.L. 1977, c. 110 (C. 5:12-52)[31] is amended to read as follows:

Appointment and Terms of Commission Members

a. Initial appointments to the commission *made pursuant to this amendatory and supplementary act* shall be for terms as follows:

[(1) One member for 1 year;]

[(2) One member for 2 years;]

[(3) One member for 3 years;]

[(4) One member for 4 years;]

[(5) One member for 5 years; who shall be designated chairman.]

(1) *One member for 2 years;*

---

[31] N.J.S.A. 5:12-52.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix D

(2) One member for 3 years;

(3) One member for 4 years; and

(4) One member for 5 years.

b. The term of each of the members first appointed *pursuant to this amendatory and supplementary act* shall be designated by the Governor.

c. After the initial appointments, all members shall be appointed for terms of 5 years; provided, however, that no member shall serve more than two terms of 5 years each.

d. Appointments to the commission *and designation of the chairman, except for the initial designation pursuant to this amendatory and supplementary act,* shall be made by the Governor with the advice and consent of the Senate. Prior to nomination, the Governor shall cause an inquiry to be conductd by the Attorney General into the nominee's background, with particular regard to the nominee's financial stability, integrity, and responsibility and his reputation for good character, honesty, and integrity.

e. Appointments to fill vacancies on the commission shall be for the unexpired term of the member to be replaced.

f. The member designated by the Governor to serve as chairman shall serve in such capacity throughout such member's entire term and until his successor shall have been duly appointed and qualified. No such member, how-

---

Note: Additions in text indicated by *italics*; deletions by [ ].

ever, shall serve in such capacity for more than 10 years. The chairman shall be the chief executive officer of the commission. *All members shall* devote full time to [the] *their* duties of [his] office and shall not pursue or engage in any other business, occupation or other gainful employment.

g. A commissioner may be removed from office for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for his office, or for incompetence. A proceeding for removal may be instituted by the Attorney General in the Superior Court. Notwithstanding any provision of this or any other act, any commissioner or employee of the commission shall automatically forfeit his office or position upon conviction of any crime. *Any commissioner or employee of the commision shall be subject to the duty to appear and testify and to removal from his office, position or employment in accordance with the provisions of P.L. 1970, c. 72 (C. 2A:18-17.2a et seq.).*

h. Each member of the commission shall serve for the duration of his term and until his successor shall be duly appointed and qualified, subject to the limitations in subsections e. and f. *of this section; provided, however, that in the event that a successor is not duly appointed and qualified within 120 days after the expiration of the member's term, a vacancy shall be deemed to exist.*

2. Section 53 of P.L. 1977, c. 110 (C. 5:12-53)[32] is amended to read as follows:

---

[32] N.J.S.A. 5:12-53.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix D

Compensation of Members

Each member of the commission other than the chairman shall receive compensation of [$18,000.00] *$60,000.00* per annum [and shall also be entitled to reimbursement for his expenses actually and necessarily incurred in the performance of his duties, including expenses of travel outside of the State.] The compensation of the chairman shall be [$60,000.00] *$65,000.00* per annum.

3. Section 54 of P.L. 1977, c. 110 (C. 5:12-54)[33] is amended to read as follows:

Organization and Employees

a. The commission may establish, and from time to time alter, such plan of organization as it may deem expedient, and may incur expenses within the limits of funds available to it.

b. The commission shall elect annually by a majority of the full commission one of its members, other than the chairman, to serve as vice-chairman for the ensuing year. The vice-chairman shall be empowered to carry out all of the responsibilities of the chairman as prescribed in this act during his absence, *disqualification,* or inability to serve.

c. The commission shall appoint an executive secretary who shall serve at its pleasure and shall be responsible for the conduct of its administrative affairs. No person

[33] N.J.S.A. 5:12-54.

Note: Additions in text indicated by *italics*; deletions by [ ].

shall be eligible for such appointment unless he shall have at least 5 years of responsible experience in public or business administration or possess broad management skills. The salary of the executive secretary shall be fixed by the commission; provided, however, that such salary shall not exceed $41,000.00.

d. The commission may employ such other personnel as it deems necessary. All employees of the commission, except for secretarial and clerical personnel, shall be in the unclassified service of the Civil Service. All employees of the commission shall be deemed confidential employees for the purposes of the "New Jersey Employer-Employee Relations Act" (P.L. 1941, c. 100; C. 34:13A-1 et seq.), as amended. Notwithstanding the provisions of any other law to the contrary, the commission may employ legal counsel who shall represent the commission in any proceeding to which it is a party, and who shall render legal advice to the commission upon its request. The commission may contract for the services of other professional, technical and operational personnel and consultants as may be necessary to the performance of its responsibilities under this act. Members and employees of the commission shall be enrolled in the Public Employees Retirement System of New Jersey (P.L. 1954, c. 84; C. 43:15A-1 et seq.).

4. Section 73 of P.L. 1977, c. 110 (C. 5:12-73)[34] is amended to read as follows:

---

[34] N.J.S.A. 5:12-73.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix D

Meetings and Quorum

a. Meetings of the commission will be held at the discretion of the chairman at such times and places as he may deem necessary and convenient, or at the call of three members of the commission.

b. The commission shall in all respects comply with the provisions of the "Open Public Meetings Act" (P.L. 1975, c. 231; C. 10:4-6 et seq.).

c. Any other law, rule or regulation to the contrary notwithstanding, the commission shall take all necessary steps to ensure that all interested persons are given adequate notice of commission meetings, and the agenda of such meetings, through the utilization of all media engaged in the dissemination of information.

d. A majority of the full commission shall determine any action of the commission, except that no casino license may be issued without the approval of 4 members. In the event that a vacancy has existed on the commission for more than 60 days, a majority of the full commission may act with respect to any matter, including the issuance of a casino license.

5. Section 90 of P.L. 1977, c. 110 (C. 5:12-90)[35] is amended to read as follows:

Licensing of Casino Employees

---

[35] N.J.S.A. 5:12-90.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix D

a. No person may commence employment as a casino employee unless he is the holder of a valid casino employee license. [The chairman may issue and renew said license and shall endorse upon any license issued hereunder the particular position which the licensee is qualified to hold, except in those circumstances where the division objects to licensure of an applicant or provides information which indicates that an applicant may lack the qualifications for licensure. In such circumstances, the commission shall have the exclusive authority to issue or to renew such a license.]

b. Any applicant for a casino employee license must, prior to the issuance of any such license, produce sufficient information, documentation and assurances to meet the qualification criteria, including New Jersey residency, contained in subsection b. of section 89 of this act and any additional residency requirement imposed under subsection c. of this section; except that the standards for business ability and casino experience may be satisfied by a showing of casino job experience and knowledge of the provisions of this act and regulations pertaining to the particular position involved, or by successful completion of a course of study at a licensed school in an approved curriculum.

c. The commission may, by regulation, require that all applicants for casino employee licenses be residents of this State for a period not to exceed 6 months immediately prior to the issuance of such license, but application may be made prior to the expiration of the required period of residency. The commission shall, by resolution, waive the

---

Note: Additions in text indicated by *italics*; deletions by [ ].

required residency period for an applicant upon a showing that the residency period would cause undue hardship upon the casino licensee which intends to employ said applicant, or upon a showing of other good cause.

d. The commission [except as provided in subsection a. of this section,] shall endorse upon any license issued hereunder the particular positions as defined by regulation which the licensee is qualified to hold.

e. The commission shall deny a casino employee license to any applicant who is disqualified on the basis of the criteria contained in section 86 of this act.

f. For the purposes of this section, casino security employees shall be considerd casino employees and must, in addition to any requirements under other laws, be licensed in accordance with the provisions of this act.

g. A temporary license may be issued by the [chairman] *commission* to casino employees for positions not directly related to gaming activity if, in [his] *its* judgment, the issuance of a plenary license will be restricted by necessary investigations and said temporary licensing of the applicant is necessary for the operations of the casino. Unless otherwise terminated pursuant to this act, a temporary license issued pursuant to this subsection shall expire 6 months from the date of its issuance and be renewable, at the discretion of the [chairman] *commission,* for one additional 6 month period. Positions "directly related to gaming activity" shall include, but not be limited to, boxmen, floormen, dealers or croupiers, cage personnel,

---

Note: Additions in text indicated by *italics;* deletions by [ ].

count room personnel, slot and slot booth personnel, credit and collection personnel, casino surveillance personnel, and casino security employees whose employment duties require or authorize access to the casino. This subsection shall expire 18 months subsequent to its enactment; provided, however, that temporary licenses issued pursuant to this subsection may be continued and renewed subsequent to the expiration of this subsection as if such expiration had not occurred.

h. Notwithstanding the provisions of subsection e. of this section, no applicant shall be denied a casino employee license on the basis of a conviction of any of the offenses enumerated in this act as disqualification criteria provided that the applicant has affirmatively demonstrated his rehabilitation. In determining whether the applicant has affirmatively demonstrated his rehablitation the commission shall consider the following factors:

(1) The nature and duties of the position applied for;

(2) The nature and seriousiness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the applicant when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix D

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision.

6. Section 91 of P.L. 1977, c. 110 (C. 5:12-91)[36] is amended to read as follows:

Casino Hotel Employee Licenses

a. No person may commence employment as a casino hotel employee unless he is the holder of a valid casino employee license issued by the *commission* [chairman].

b. Any applicant for a casino hotel employee license must, prior to the issuance of any such license, produce sufficient information, documentation and assurances to meet the qualification criteria, including New Jersey residency, contained in subsection b.(1), b.(2) and b.(4) of section 89 of this act and any additional residency requirement imposed under subsection c. of this section. No casino hotel employee license shall be issued to any person disqualified on the basis of the criteria contained in section 86 of this act.

c. The commission may, by regulation, require that all applicants for casino hotel employee licenses be residents

---

[36] N.J.S.A. 5:12-91.

Note: Additions in text indicated by *italics*; deletions by [ ].

of this State for a period not to exceed 3 months immediately prior to the issuance of such license, but application may be made prior to the expiration of the required period of residency. The [chairman] *commission* shall waive the required residency period for an applicant upon a showing that the residency period would cause undue hardship upon the casino licensee which intends to employ said applicant, or upon a showing of other good cause.

d. Notwithstanding the provisions of subsection b. of this section, no applicant shall be denied a casino hotel employee license on the basis of a conviction of any of the offenses enumerated in this act as disqualification criteria, provided that the applicant has affirmatively demonstrated his rehabilitation. In determining whether the applicant has affirmatively demonstrated his rehabilitation the commission shall consider the following factors:

(1) The nature and duties of the position applied for;

(2) The nature and seriousness of the offenses;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the applicant when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychi-

---

Note: Additions in text indicated by *italics*; deletions by [ ].

atric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision.

e. The commission may waive any disqualification criterion for a casino hotel employee consistent with the public policy of this act and upon a finding that the interests of justice so require.

f. Temporary license may be issued by the *commission* [chairman] if in [his] *its* judgment the issuance of a permanent license will be restricted by necessary investigations and said temporary licensing of the applicant is necessary for the operation of the hotel. Unless otherwise terminated pursuant to this act, a temporary license issued pursuant to this subsection shall expire 6 months from the date of its issuance and be renewable, at the discretion of the *commission* [chairman], for one additional 6-month period.

7. Section 92 of P.L. 1977, c. 110 (C. 5:12-92)[37] is amended to read as follows:

Licensing and Registration of Casino Service Industries

a. All casino service industries offering goods or services on a regular basis which directly relate to casino or gaming activity, including gaming equipment manufac-

---

[37] N.J.S.A. 5:12-92.

Note: Additions in text indicated by *italics*; deletions by [ ].

turers, suppliers and repairers, schools teaching gaming and either playing or dealing techniques, and casino security services, shall be licensed in accordance with the provisions of this act prior to conducting any business whatsoever with a casino licensee, its employees or agents, and in the case of a school, prior to enrollment of any students or offering of any courses to the public whether for compensation or not; provided however, that upon a showing of good cause by a casino licensee for each business transaction, the commission may permit an applicant for a casino service industry license to conduct busines transactions with such casino licensee prior to the licensure of that applicant under this subsection.

b. Each casino service industry in subsection a. of this section, as well as its owners, management and supervisory personnel and other principal employees must qualify under the standards, except residency, established for qualification of a casino key employee under this act. In addition, if the business or enterprise is a school teaching gaming and either playing or dealing techniques, each resident director, instructor, principal employee, and sales representative employed thereby shall be licensed under the standards established for qualification of a casino employee under this act; provided, however, that nothing in this subsection shall be deemed to require, in the case of a public school district or a public institution of higher education, the licensure or qualification of any individuals except those instructors and other principal employees responsible for the teaching of playing or dealings techniques. The [chairman] *commission,* in [his] *its* discretion,

---

Note: Additions in text indicated by *italics;* deletions by [ ].

may issue a temporary license to an applicant for an instructor's license upon a finding that the applicant meets the educational and experiential requirements for such license, that the issuance of a permanent license will be restricted by necessary investigations, and that temporary licensing is necessary for the operation of the gaming school. Unless otherwise terminated pursuant to this act, a temporary license issued pursuant to this subsection shall expire 6 months from the date of its issuance and be renewable, at the discretion of the [chairman] *commission,* for one additional 6-month period. The temporary licensing provisions of this subsection shall expire 18 months subsequent to its enactment; provided, however, that temporary licenses issued pursuant to this subsection may be continued and renewed subsequent to the expiration of the temporary licensing provisions of this subsection as if such expiration had not occurred.

c. All casino service industries not included in subsection a. of this section shall be licensed in accordance with rules of the commission prior to commencement or continuation of any business with a casino licensee or its agents. Such casino service industries, whether or not directly related to gaming operations, shall include suppliers of alcoholic beverages, food and nonalcoholic beverages; garbage handlers; vending machine providers; linen suppliers; maintenance companies; shopkeepers located within the approved hotel; and limousine services contracting with casino licensees. The commission may exempt any person or field of commerce from the licensing requirements of this subsection if the person or field of commerce demonstrates (1) that it is regulated by a

---

Note: Additions in text indicated by *italics*; deletions by [ ].

public agency or that it will provide goods or services in in substantial or insignificant amounts or quantities, and (2) that licensing is not deemed necessary in order to protect the public interest or to accomplish the policies established by this act. Upon granting an exemption or at any time thereafter, the commission may limit or place such restrictions thereupon as it may deem necessary in the public interest, and shall require the exempted person to cooperate with the commission and the division and, upon request, to provide information in the same manner as required of a casino service industry licensed pursuant to this subsection provided, however, that no exemption shall be granted unless the casino service industry complies with the requirements of section 134 and 135 of this act.

d. Licensure pursuant to subsection c. of this section of any casino service industry may be denied to any applicant disqualified in accordance with the criteria contained in section 86 of this act.

8. Section 94 of P.L. 1977, c. 110 (C. 5:12-94)[38] is amended to read as follows:

Approval and Denial of Registrations and Licenses Other Than Casino Licenses

a. Upon the filing of an application for any license or registration required by this act other than a casino license, and after submission of such supplemental information as the commission may require, the commission shall

---

[38]N.J.S.A. 5:12-94.

Note: Additions in text indicated by *italics*; deletions by [ ].

request the division to conduct such investigation into the qualification of the applicant, and the commission shall conduct such hearings concerning the qualification of the applicant in accordance with its regulations as may be necessary to determine qualification for such license or registration.

b. After such investigation, the commission may either deny the application or grant a license to or accept the registration of an applicant whom it determines to be qualified to hold such license or registration. [Notwithstanding the above, the chairman may, where authorized, grant a casino employee license or a casino hotel employee license upon application therefor; if said application is denied, the applicant may appeal to the commission in the normal course.]

c. The commission shall have the authority to deny any application pursuant to the provisions of this act. When an application is denied, the commission shall prepare and file its order denying such application with the general reasons therefor, and if requested by the applicant, shall further prepare and file a statement of the reasons for the denial, including the specific findings of facts.

d. When the commission grants an application, the commission may limit or place such restrictions thereupon as it may deem necessary in the public interest. Licenses shall be granted and registration approved for a term of 1 year; provided, however, that casino employee licenses for positions directly related to gaming activity and for gaming school resident director, instructor, principal em-

---

Note: Additions in text indicated by *italics*; deletions by [ ].

ployee and sales representative licenses shall be granted for a term of 2 years; and provided further that casino employee licenses for positions not directly related to gaming activity, casino hotel employee licenses, and casino service industry licenses issued pursuant to subsection c. of section 92 of P.L. 1977, c. 110 (C. 5:12-92c.) shall be granted for a term of 3 years.

e. After an application is submitted to the commission, final action of the commission shall be taken within 90 days after completion of all hearings and investigations and the receipt of all information required by the commission.

9.

In order to effect an orderly transition, any part-time member of the commission who is serving in the course of a term of office on the effective date of this amendatory and supplementary act shall continue to serve as a part-time commissioner for the duration of his term of office and until his full-time successor is duly appointed and qualified, but not later than 120 days following the expiration of his term of office; provided, however, that in the event of the termination of his service prior to the expiration of his term, a full-time successor shall be appointed for a term to be designated by the Governor pursuant to section 52 of P.L. 1977, c. 110 (C. 5:12-52). Any part-time member of the commission who is serving as a holdover on the effective date of this amendatory and supplementary act shall continue to serve until his full-time successor is duly appointed and qualified, but not later than 120 days following the effective date of this amenda-

---

Note: Additions in text indicated by *italics*; deletions by [ ].

tory and supplementary act. The chairman of the commission on the effective date of this amendatory and supplementary act shall continue to serve as chairman until November 15, 1980, and until such time as a successor chairman is designated pursuant to this amendatory and supplementary act. Thereafter he shall continue as a member of the commission for a term which shall expire on July 25, 1981.

10.[39]

This act shall take effect immediately, but shall remain inoperative until Senate No. 1068 and Senate No. 1069 are enacted into law.

Approved May 20, 1980.

---

[39] N.J.S.A. 5:12-52 note.

Note: Additions in text indicated by *italics*; deletions by [ ].

APPENDIX E

L. 1980, *c.* 69

CASINO CONTROL ACT—AMENDMENTS
CHAPTER 69

SENATE No. 1069

An Act to amend and supplement the "Casino Control Act," approved June 2, 1977 (P.L. 1977, c. 110).

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 55 of P.L. 1977, c. 110 (C. 5:12-55)[51] is amended to read as follows:

Division of Gaming Enforcement.

There is hereby established in the Department of Law and Public Safety the Division of Gaming Enforcement. The division shall be under the immediate supervision of a director who shall also be sworn as an Assistant Attorney General and who shall administer the work of the division under the direction and supervision of the Attorney General. The director shall be appointed by the Governor, with the advice and consent of the Senate, and shall serve during the term of office of the Governor, except that the first director shall be appointed for a term of 2 years. The director may be removed from office by the Attorney General for cause upon notice and opportunity to be heard.

---

[51] N.J.S.A. 5:12-55.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix E

The director and any employee or agent of the division shall be subject to the duty to appear and testify and to removal from his office, position or employment in accordance with the provisions of P.L. 1970, c. 72 (C. 2A:81-17.2a et seq.). The Attorney General shall be responsible for the exercise of the duties and powers assigned to the division.

2. Section 59 of P.L. 1977, c. 110 (C. 5:12-59)[52] is amended to read as follows:

Employment Restrictions on Commissioners, Commission Employees and Division Employees.

a. The "New Jersey Conflicts of Interest Law" (P.L. 1971, c. 182; C. 52:13D-12 et seq.) shall apply to members of the commission and to all employees of the commission and the division, except as herein specifically provided.

[b. A Code of Ethics governing the specific needs of the commission and the division shall be promulgated by each and shall include, among other provisions, that:]

b. The commission shall, no later than January 1, 1981, promulgate a Code of Ethics that is modeled upon the Code of Judicial Conduct of the American Bar Association, as amended and adopted by the Supreme Court of New Jersey. This Code of Ethics shall include, but not be limited to, provisions that address the propriety of relationships and dealings between the commission and its staff, and licensees and applicants for licensure under this act.

---

[52] N.J.S.A. 5:12-59.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix E

c. The division shall promulgate a Code of Ethics governing its specific needs.

d. The Codes of Ethics promulgated by the commission and the division shall not be in conflict with the laws of this State, except, however, that said Codes of Ethics may be more restrictive than any law of this State.

e. The Codes of Ethics promulgated by the commission and the division shall be submitted to the Executive Commission on Ethical Standards for approval. The Codes of Ethics shall include, but not be limited to provisions that:

(1) No commission member or employee or division employee or agent shall be permitted to gamble in any establishment licensed by the commission except in the course of his duties.

(2) No commission member or employee or division employee or agent shall solicit or accept employment from any person licensed by or registered with the commission or from any applicant for a period of 4 years after termination of service with the commission, or division, unless subject to section 60 of this act.

(3) No commission member or employee or any division employee or agent shall act in his official capacity in any matter wherein he or his spouse, child, parent or sibling has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix E

(4) No commission employee or any division employee or agent shall act in his official capacity in a matter concerning an applicant for licensure or a licensee who is the employer of a spouse, child, parent or sibling of said commission or division employee or agent when the fact the employment of such spouse, child, parent or sibling might reasonably be expected to impair the objectivity and independence of judgment of said commission employee or division employee or agent.

(5) No spouse, child, parent or sibling of a commission member shall be employed in any capacity by an applicant for a casino license or a casino licensee nor by any holding, intermediary or subsidiary company thereof.

(6) No commission member shall meet with any person, except for any other member of the commission or employee of the commission, or discuss with him any issues involving any pending or proposed application or any matter whatsoever which may reasonably be expected to come before the commission, or any member thereof, for determination unless the meeting or discussion takes place on the business premises of the commission, provided, however, that commission members may meet to consider matters requiring the physical inspection of equipment or premises at the location of the equipment or premises. All meetings or discussions subject to this paragraph shall be noted in a log maintained for this purpose and available for inspection pursuant to the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.).

[e]. *f.* No commision member or employee or division agent shall have any interest, direct or indirect, in any

---

Note: Additions in text indicated by *italics*; deletions by [ ].

applicant or in any person licensed by or registered with the commission during his term of office or employment.

[d. No commission member shall be employed in any capacity by any person licensed by or registered with the commission.]

[e.] *g.* Each *commission member and* employee of the commission, including legal counsel, and each employee and agent of the division shall devote his entire time and attention to his duties and shall not pursue any other business or occupation or other gainful employment; provided, however, that secretarial and clerical personnel may engage in such other gainful employment as shall not interfere with their duties to the commission or division, unless otherwise directed—[and further provided, that the commission may employ hearing examiners on a part time basis].

[f.] *h.* No member of the commission, employee of the commission, or employee or agent of the division shall:

(1) Use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) Directly or indirectly coerce, attempt to coerce, command or advise any person to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes; or

(3) Take any active part in political compaigns or the management thereof; provided, however, that nothing

---

Note: Additions in text indicated by *italics*; deletions by [ ].

herein shall prohibit a person from voting as he chooses or from expressing his personal opinions on political subjects and candidates.

[g.] *i.* For the purpose of applying the provisions of the "New Jersey Conflicts of Interest Law," any consultant or other person under contract for services to the commission shall be deemed to be a special State employee. Such person and any corporation, firm or partnership in which he has an interest or by which he is employed shall not represent any person or party other than the commission before the commission.

3. Section 99 of P.L. 1977, c. 110 (C. 5:12-99)[53] is amended to read as follows:

Internal Controls

a. Each casino licensee shall submit to the commission a description of its system of internal procedures and administrative and accounting controls. Such submission shall be made at least 90 days before gaming operations are to commence or before changes in previously submitted control plans are to become effective, unless otherwise directed by the commission. Each such submission shall contain both narrative and diagrammatic representations of the internal control system to be utilized by the casino, including, but not limited to:

(1) Accounting controls, including the standardization of forms and definition of terms to be utilized in the gaming operations;

---

[53] N.J.S.A. 5:12-99.

Note: Additions in text indicated by *italics*; deletions by [ ].

Appendix E

(2) Procedures, forms, and, where appropriate, formulas covering the calculation of hold percentages, revenue drop, expense and overhead schedules, complimentary services, junkets, cash equivalent transactions, salary structure and personnel practices;

(3) Job descriptions and the system of personnel and chain-of-command, establishing a diversity of responsibility among employees engaged in casino operations and identifying primary and secondary supervisory positions for areas of responsibility, which areas shall not be so extensive as to be impractical for an individual to monitor;

(4) Procedures within the cashier's cage for the receipt, storage and disbursal of chips, cash, and other cash equivalents used in gaming; the cashing of checks; the redemption of chips and other cash equivalents used in gaming; the pay-off of jackpots; and the recording of transactions pertaining to gaming operations;

(5) Procedures for the collection and security of moneys at the gaming tables;

(6) Procedures for the transfer and recordation of chips between the gaming tables and the cashier's cage;

(7) Procedures for the transfer of moneys from the gaming tables to the counting process;

(8) Procedures and security for the counting and recordation of revenue;

(9) Procedures for the security, storage and recordation of chips and other cash equivalents utilized in the gaming operation;

Note: Additions in text indicated by *italics;* deletions by [ ].

Appendix E

(10) Procedures for the transfer of moneys or chips from and to the slot machines;

(11) Procedures and standards for the opening and security of slot machines;

(12) Procedures for the payment and recordation of slot machine jackpots;

(13) Procedures for the cashing and recordation of checks exchanged by casino patrons;

(14) Procedures governing the utilization of the private security force within the casino;

(15) Procedures and security standards for the handling and storage of gaming apparatus including cards, dice, machines, wheels and all other gaming equipment; [and]

(16) Procedures and rules governing the conduct of particular games and the responsibility of casino personnel in respect thereto; *and*

(17) Procedures for separately recording all transactions pursuant to section 101 of this act involving the Governor, any State officer or employee, or any special State officer or employee, any member of the Judiciary, any member of the Legislature, or any officer of a municipality or county in which casino gaming is authorized, and for the quarterly filing with the Attorney General of a list reporting all such transactions.

Note: Additions in text indicated by *italics*; deletions by [ ].

b. The commission shall review each submission required by subsection a. hereof, and shall determine whether it conforms to the requirements of this act and to the regulations promulgated thereunder and whether the system submitted provides adequate and effective controls for the operations of the particular casino submitting it. If the commission finds any insufficiencies, it shall specify same in writing to the casino licensee, who shall make appropriate alterations. When the commission determines a submission to be adequate in all respects, it shall notify the casino licensee of same. No casino licensee shall commence gaming operations, or alter in fact its internal controls, unless and until such system of controls is approved by the commission.

4. Section 102 of P.L. 1977, c. 110 (C. 5:12-102)[54] is amended to read as follows:

Junkets and Complimentary Services

a. No junkets may be organized or permitted except in accordance with the provisions of this act. No person may act as a junket representative except in accordance with this section. For purposes of this section, the term "junket representative" shall mean any person who is responsible for or directly engaged in the creation, organization, or operation of a junket, regardless of whether or not such junket is engaged in or organized within the State of New Jersey.

b. A junket representative shall be licensed as a casino key employee in accordance with the provisions of this act;

---

[54] N.J.S.A. 5:12-102.

Note: Additions in text indicated by *italics*; deletions by [ ].

provided, however, that said licensee need not be a resident of this State. No casino licensee may employ or otherwise engage a junket representative who is not so licensed.

c. A casino licensee shall be responsible for the conduct of any junket representative associated with it and for the terms and conditions of any junket engaged in on its premises, regardless of the employment status of any junket representative associated therewith.

d. Each casino licensee shall either:

(1) Submit to the commission, in accordance with its rules, a report in advance of any junket which shall include the names of the participants, the terms of the junket, the origin and dates of the junket, and such other information as may be required by the commission, including, without limitation, acknowledgements by the participants that they understand the terms of the particular junket; or

(2) Submit to the commission, in accordance with its rules, proposals for junkets, which proposals may be approved by the commission for continued use upon the condition that no material aspect of any proposal will be changed except as to participants and that quarterly reports regarding such junkets shall be submitted to the commission, including such information as it may require.

e. A casino licensee shall be responsible for any violation or deviation from the terms of a junket. Notwith-

---

Note: Additions in text indicated by *italics;* deletions by [ ].

standing any other provisions of this act, the commission may, after hearings in accordance with this act, order restitution to junket participants, assess penalties for such violations or deviations, prohibit future junkets by the casino licensee or junket representatives, and order such further relief as it deems appropriate.

f. Each casino licensee shall maintain a regulated complimentary service account and shall submit a quarterly report to the commission based upon such account and covering all complimentary services offered or engaged in by the licensee during the immediately preceding quarter. Such reports shall include identification of the regulated complimentary services and their respective costs, the number of persons by category of service who received same, and such other information as the commission may require.

g. (1) For the purpose of this subsection "person" means State officers or employees subject to disclosure by law or executive order; special State officers and employees; the Governor; any member of the Legislature or Judiciary; any member of the governing body, or the municipal attorney of a municipality wherein a casino is located; any member of or attorney for the planning board or zoning board of adjustment of a municipality wherein a casino is located, or any professional planner regularly employed by such planning board or zoning board of adjustment.

(2) No casino licensee shall provide directly or indirectly to any person as defined in this subsection, any com-

---

Note: Additions in text indicated by *italics*; deletions by [ ].

limentary service or discount which is other than such service or discount that is offered to the general public.

5.[55]

a. No applicant or person or organization licensed by or registered with the commission shall employ or offer to employ any person who is prohibited from accepting employment from a licensee or applicant or any holding or intermediary company under subsection b. of section 5 of P.L. 1971, c. 182 (C. 52:13D-16) or section 2 of P.L. [1980], c. [79] (now pending before the Legislature as Senate Bill No. 1068).

b. An applicant or person or organization who violates the provisions of this section is subject to a penalty of not less than $5,000.00 nor more than $10,000.00 to be collected in a summary proceeding under the "penalty enforcement law" (N.J.S. 2A:58-1 et seq.).

6.

This act shall take effect immediately.

Approved and effective July 14, 1980.

---

[55] N.J.S.A. 5:12-117.1.

Note: Additions in text indicated by *italics*; deletions by [ ].

APPENDIX F

L. 1980, *c.* 159

CHAPTER 159

An Act concerning the regulation and control of casinos and amending P.L. 1977, c. 110, P.L. 1980, c. 28 and P. L. 1980, c. 69.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 102 of P. L. 1977, c. 110 (C. 5:12-102) is amended to read as follows:

C. 5:12-102 Junkets and Complimentary Services.

102. Junkets and Complementary Services. a. No junkets may be organized or permitted except in accordance with the provisions of this act. No person may act as a junket representative except in accordance with this section. For purposes of this section, the term "junket representative" shall mean any person who is responsible for or directly engaged in the creation, organization, or operation of a junket, regardless of whether or not such junket is engaged in or orgainzed within the State of New Jersey.

b. A junket representative shall be licensed as a casino key employee in accordance with the provisions of this act; provided, however, that said licensee need not be a resident of this State. No casino licensee may employ or otherwise engage a junket representative who is not so licensed.

c. A casino licensee shall be responsible for the conduct of any junket representative associated with it and

for the terms and conditions of any junket engaged in on its premises, regardless of the employment status of any junket representative associated therewith.

d. Each casino licensee shall either:

(1) Submit to the commission, in accordance with its rules, a report in advance of any junket which shall include the names of the participants, the terms of the junket, the origin and dates of the junket, and such other information as may be required by the commission, including, without limitation, acknowledgments by the participants that they understand the terms of the particular junket; or

(2) Submit to the commission, in accordance with its rules, proposals for junkets, which proposals may be approved by the commission for continued use upon the condition that no material aspect of any proposal will be changed except as to participants and that quarterly reports regarding such junkets shall be submitted to the commission, including such information as it may require.

e. A casino licensee shall be responsible for any violation or deviation from the terms of a junket. Notwithstanding any other provisions of this act, the commission may, after hearings in accordance with this act, order restitution to junket participants, assess penalties for such violations or deviations, prohibit future junkets by the casino licensee or junket representatives, and order such further relief as it deems appropriate.

f. Each casino licensee shall maintain a regulated complimentary service account and shall submit a quarterly report to the commission based upon such account and

covering all complimentary services offered or engaged in by the licensee during the immediately preceding quarter. Such reports shall include identification of the regulated complimentary services and their respective costs, the number of persons by category of service who received same, and such other information as the commission may require.

g. As used in this subsection "person"means any State officer or employee subject to financial disclosure by law or executive order and any other State officer or employee with responsibility for matters affecting gambling; any special State officer or employee with responsibility for matters affecting gambling; the Governor; any member of the Legislature or full time member of the Judiciary; any full-time professional employee of the Office of the Governor, the Administrative Office of the Courts, or the Legislature; the head of a principal department; the assistant or deputy heads of a principal department, including all assistant and deputy commissioners; the head of any division of a principal department; any member of the governing body, or the municipal judge or the municipal attorney of a municipality wherein a casino is located; any member of or attorney for the planning board or zoning board of adjustment of a municipality wherein a casino is located, or any professional planner or consultant regularly employed or retained by such planning board or zoning board of adjustment.

No casino applicant or licensee shall provide directly or indirectly to any person, any complimentary service or discount which is other then such service or discount that is offered to members of the general public in like circumstance.

Appendix F

2. Section 10 of P. L. 1980, c. 28 is amended to read as follows:

10. This act shall take effect immediately, but shall remain inoperative until Senate Bill No. 1369, now pending in the Legislature, is enacted into law.

3. Section 5 of P. L. 1980, c. 69 (C. 5:12-117.1) is amended to read as follows:

C. 5:12-117.1 Employment of persons prohibited from accepting employment; violation of act.

5. a. No applicant or person or organization licensed by or registered with the commission shall employ or offer to employ any person who is prohibited from accepting employment from a licensee or applicant or any holding or intermediary company under subsection b. of section 5 of P. L. 1971, c. 182 (C. 52:13D-16) or section 3 of P. L. ....., c. ..... (now pending before the Legislature as Senate Bill No. 1369).

b. An applicant or person or organization who violates the provisions of this section is guilty of a crime of the fourth degree.

4. This act shall take effect immediately.

Approved December 1, 1980.

APPENDIX G

Plaintiffs' Complaint Filed August 29, 1980 in the Superior Court of New Jersey

SUPERIOR COURT OF NEW JERSEY

Chancery Division: Mercer County

Civil Action

Docket No.

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM and EDWARD KRAMER,

Plaintiffs,

vs.

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Defendants.

Appendix G

Plaintiffs, by way of complaint against defendants, say:

PARTIES

(APPLICABLE TO ALL COUNTS)

1. Plaintiff Marijane Singer is Chairperson of the Rutgers University Board of Trustees, and is gainfully employed as a public relations consultant.

2. Plaintiff Judd Levy resigned as a Commissioner of the New Jersey Highway Authority in July 1980, and is gainfully employed as a Vice President of Merrill Lynch Pierce Fenner and Smith.

3. Plaintiff Martin Brody resigned as a Director of the New Jersey Transit Corporation in July 1980, and is gainfully employed as Chairman of the Board of Restaurant Associates Industries, Inc.

4. Plaintiff Edward A. Jesser, Jr. resigned as a Member of the New Jersey Economic Development Council in July 1980, and is gainfully employed as Chairman of the Board of United Jersey Banks.

5. Plaintiff Robert F. Kelleher resigned as a Member of the Board of Trustees of Stockton State College in July 1980, and is gainfully employed as President of the Atlantic National Bank.

6. Plaintiff Frank K. Keleman resigned as Chairman of the State Investment Council in July 1980, and is gainfully employed as a Director of the Heritage Bank Corporation and of other entities.

Appendix G

7. Plaintiff Harvey Moskowitz resigned as a Member of the New Jersey Board of Professional Planners in July 1980, and is gainfully employed as a professional planner.

8. Plaintiff Leonard Schwartz resigned as a Member of the State Investment Council in July 1980, and is gainfully employed as an attorney-at-law of New Jersey.

9. Plaintiff Fred R. Sullivan resigned as a Member of the Board of Overseers of the Rutgers University Foundation in July 1980, and is gainfully employed as Chairman and President of Kidde, Inc.

10. Plaintiff Carleton A. Holstrom resigned as Chairman of the Board of Overseers of the Rutgers University Foundation in July 1980, and is gainfully employed as Chief Financial Officer of Bear, Stearns & Co.

11. Plaintiff Edward Kramer is a Member of the Board of Governors of Rutgers University, and is gainfully employed as General Manager for the New Jersey Region of the International Ladies' Garment Workers' Union.

12. Defendant State of New Jersey is the government in, by and for which the legislation challenged herein was enacted.

13. Defendant Brendan T. Byrne is the Governor of the State of New Jersey, and as such is charged with enforcement of the laws of the State of New Jersey.

14. Defendant Department of Law and Public Safety is the executive department of the State of New Jersey charged with enforcement of the laws of the State of New Jersey.

15. Defendant John J. Degnan is the Attorney General and as such the chief law enforcement officer of the State of New Jersey, and is the chief executive of the Department of Law and Public Safety.

16. Defendant Executive Commission on Ethical Standards is within the Department of Law and Public Safety, and is charged with the interpretation, application and enforcement of the New Jersey Conflicts of Interest Law, which the legislation challenged herein amends and supplements.

17. Defendant Angelo Bianchi is Chairman of the Executive Commission on Ethical Standards.

18. Defendant Richard Mount is a member of the Executive Commission on Ethical Standards.

19. Defendant Warren Smith is a member of the Executive Commission on Ethical Standards.

20. Defendant Jacob Taporek is a member of the Executive Commission on Ethical Standards.

21. Defendant Edward Hofgesang is a member of the Executive Commission on Ethical Standards.

22. Defendant Joan Haberle is a member of the Executive Commission on Ethical Standards.

FACTUAL BACKGROUND
(APPLICABLE TO ALL COUNTS)

23. On July 28, 1980 legislation amending and supplementing the New Jersey Conflicts of Interest Law, N.J.S.A.

52:13D-1 *et seq.* (P. L. 1971, c. 182) and known as Senate Bill No. 1068 ("S1068") became New Jersey Public Law P. L. 1980, c. 79 (the "Act") without the signature of the Governor of the State of New Jersey. A copy of the Act is attached hereto as Exhibit A.

24. Among those persons subject to the Act are "special State officers and employees", who are defined in the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-13(e), as follows:

> "(1) any person holding an office or employment in a State agency, for which office or employment no compensation is authorized or provided by law, or no compensation other than a sum in reimbursement of expenses, whether payable per diem or per annum, is authorized or provided by law. . . ."

The term "State agency" is defined as follows:

> "any of the principal departments in the Executive Branch of the State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department, the Legislature of the State and any office, board, bureau or commission, with or created by the Legislative Branch, and any independent State authority, commission, instrumentality or agency. A county or municipality shall not be deemed an agency or instrumentality of the State."

25. The Act prohibits *inter alia*:

A. any special State officer or employee from accepting employment with any holder of, or applicant for, a casino license, or any holding or intermediary company.

B. any special State officer or employee or any partnership, firm or corporation with which said officer or employee is associated, from accepting employment as agent or attorney to represent, appear for or negotiate on behalf of any holder of, or applicant for, a casino license, or any holding or intermediary company.

C. any partner, officer or employee of a partnership, firm or corporation with which a special State officer or employee is associated, from any of the activity described in subparagraphs A and B.

D. any special State officer or employee for two years after termination of his office or employment from acquiring more than a one percent interest in, or accepting employment with any holder of, or applicant for, a casino license, or any holding or intermediary company.

E. any special State officer or employee for two years after termination of his office or employment from representing, appearing for or negotiating on behalf of any holder of, or applicant for, a casino license, or any holding or intermediary company.

F. Any partner, officer or employee of a partnership, firm or corporation with which such former special State officer or employee is associated, from any of the activity described in subparagraph D or E.

26. The sanctions that the defendants may impose for violation of the Act are set forth in the Act and in the New Jersey Conflicts of Interest Law, which the Act amends and supplements, and include *inter alia* the initiation, receipt and hearing of complaints by defendant

Executive Commission on Ethical Standards, the imposition of monetary penalties by said defendant, removal and disqualification of a violator from public office, and prosecution by defendant Department of Law and Public Safety for a disorderly person's offense.

27. Defendants each bear the responsibility to enforce the Act and the New Jersey Conflicts of Interest Law.

COUNT I

28. The Act has violated and continues to violate the following rights, among others, of those plaintiffs who are former, present and future special State officers and employees, secured to them by the Constitution of the United States:

A. The Act deprives said plaintiffs of the following substantive rights, among others, accorded to them by the Due Process Clause of the Fourteenth Amendment:

(1) The right to liberty and to pursuit of their occupational and employment opportunities without unlawful interference by the State;

(2) The right to be free from enforcement by the State of vague civil and criminal statutes and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(3) The right to be free from enforcement by the State of statutes that are overbroad in terms both of the persons and the conduct restrained, and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(4) The right to enjoy the property rights that inhere in a term of office as a special State officer or employee;

(5) The right to be free from being stigmatized and penalized by virtue of status unrelated to conduct.

B. The Act impermissibly discriminates between special State officers and employees who are associated with or wish to become associated with casino licensees or applicants, and special State officers and employees who are associated with or wish to become associated with other legal enterprises, in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. The Act deprives said plaintiffs of the following rights, among others, accorded to them by the First Amendment:

(1) The right to participate in political and governmental institutions without unwarranted disqualification;

(2) The right to express themselves as members of political and governmental institutions without unwarranted disqualification;

(3) The right to associate with casino licensees and applicants without thereby suffering disqualification from participation and expression in political and governmental institutions.

D. The Act constitutes a bill of attainder which penalizes plaintiffs by virtue of their status without regard to their conduct, in violation of Article I, Section 10(1).

Appendix G

E. The Act impairs the obligations of the contract between each of said plaintiffs and the State existing at the time of its enactment by altering the terms and conditions governing the respective parties, in violation of Article 1, Section 10(1).

F. The Act deprives plaintiffs of a republican form of government, in violation of Article IV, Section 4.

29. The Act has violated and continues to violate all of plaintiffs' aforesaid constitutionally protected rights without being the least drastic means necessary to advance a legitimate and compelling state interest, and is otherwise totally unjustified as to said plaintiffs.

30. The Act has had direct, immediate, irreparable, substantial and damaging effects, and continues to have such effects, among them:

(a) violating plaintiffs' constitutional, property and other rights;

(b) forcing over 175 special State officers and employees to resign their state offices in order to avoid some of the prohibitions of the Act. Plaintiffs Levy, Brody, Jesser, Kelleher, Keleman, Moskowitz, Schwartz, Sullivan and Holstrom herein are among those who have resigned as aforesaid;

(c) imposing upon hundreds of special State officers and employees who have not resigned their state offices the prohibitions of the Act. Plaintiffs Singer and Kramer herein are among those who have not resigned as aforesaid;

(d) foreclosing to hundreds of citizens of the State of New Jersey the opportunity to participate in their state government by serving as special State officers and employees. Plaintiffs Levy, Brody, Jesser, Kelleher, Keleman, Moskowitz, Schwartz, Sullivan and Holstrom herein are among those who have been precluded as aforesaid;

(e) disrupting the orderly and effective operation of State government by causing the resignation of over 175 special State officers and employees, by causing the resignation of special State officers and employees of long experience, whose experience cannot be duplicated by others in the future, by increasing the burdens upon and the reluctance of others who are asked to serve without compensation as special State officers and employees, by rendering many state boards and commissions inoperative by forcing the resignations of those who were necessary to constitute a quorum, and in other grievous ways.

31. Article VII, Section 1 of the Constitution of the State of New Jersey, provides as follows:

> "1. Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability."

Article V, Section 1, Paragraph 11 of the Constitution and N.J.S.A. 52:17A-4(h) also impose upon the Governor and Attorney General of the State of New Jersey, respectively, the duty to enforce the provisions of the Constitutions of the United States and of New Jersey. With knowledge of the existence of S-1068 and P.L. 1980, c. 79 and of the

violations of constitutional and other rights of plaintiffs contained therein and caused thereby, defendants have failed to perform their duty to protect and defend said rights.

WHEREFORE, plaintiffs demand judgment against each and every defendant:

1. Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c. 79 that impose restrictions upon, mention or otherwise affect spesial State officers and employees;

2. Declaring unconstitutional and of no force and effect P.L. 1980, c. 79 as applied to plaintiffs;

3. Enjoining and restraining defendants, their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c. 79 against plaintiffs, or against any other past, present or future special State officers and employees, and declaring null and void any actions taken to enforce said Act prior to the date of judgment herein;

4. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

5. Ordering defendants to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

6. Granting such other relief as may be necessary and just.

Appendix G

COUNT II

32. Plaintiffs repeat each of the allegations set forth in Paragraphs 29, 30 and 31 of Count I as if the same were set forth at length herein.

33. The Act has violated and continues to violate the following rights, among others, of plaintiffs as citizens of the State of New Jersey, secured to them by the Constitution of the United States:

A. The Act deprives said plaintiffs of the following rights, among others, accorded to them by the First Amendment:

(1) The right to participate in political and governmental institutions without unwarranted disqualification;

(2) The right to express themselves as members of political and governmental institutions without unwarranted disqualification;

(3) The right to associate with casino licensees and applicatns without thereby suffering disqualification from participation and expression in political and governmental institutions.

B. The Act impermissibly discriminates between those plaintiff citizens who are associated with or wish to become associated with casino licensees or applicants, and those citizens who are associated with or wish to become associated with other legal enterprises, in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. The Act deprives said plaintiffs of the following substantive rights, among others, accorded to them by the Due Process Clause of the Fourteenth Amendment:

(1) The right to liberty and to pursuit of their occupational and employment opportunities without unlawful interference by the State;

(2) The right to be free from enforcement by the State of vague civil and criminal statutes and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(3) The right to be free from enforcement by the State of statutes that are overbroad in terms both of the persons and the conduct restrained, and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(4) The right to be free from being stigmatized and penalized by virtue of status unrelated to conduct.

D. The Act constitutes a bill of attainder which penalizes plaintiffs by virtue of their status without regard to their conduct in violation of Article I, Section 10(1).

E. The Act deprives plaintiffs of a republican form of government in violation of Article IV, Section 4.

WHEREFORE, plaintiffs demand judgment against each and every defendant:

1. Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c. 79 that impose restrictions upon, mention or otherwise affect special State officers and employees;

2. Declaring unconstitutional and of no force and effect P.L. 1980, c. 79 as applied to plaintiffs;

3. Enjoining and restraining defendants; their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c. 79 against plaintiffs, or against any other past, present or future special State officers and employees, and declaring null and void any action taken to enforce said Act prior to the date of judgment herein;

4. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

5. Ordering defendants to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

6. Granting such other relief as may be necessary and just.

COUNT III

34. Plaintiffs repeat each of the allegations set forth in Paragraphs 29, 30 and 31 of Count I as if the same were set forth at length herein.

35. The Act has violated and continues to violate the following rights, among others, of those plaintiffs who are former, present and future special State officers and employees, secured to them by the Constitution of the State of New Jersey (1947):

A. The Act deprives said plaintiffs of the following substantive due process rights accorded to them by Article I, Section 1:

(1) The right to liberty and to pursuit of their occupational and employment opportunities without unlawful interference by the State;

(2) The right to be free from enforcement by the State of vague civil and criminal statutes and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(3) The right to be free from enforcement by the State of statutes that are overbroad in terms both of the persons and the conduct restrained, and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(4) The right to enjoy the property rights that inhere in a term of office as a special State officer or employee;

(5) The right to be free from being stigmatized and penalized by virtue of status unrelated to conduct.

B. The Act impermissibly discriminates between special State officers and employees who are associated with or wish to become associated with casino licensees or applicants, and special State officers and employees who are associated with or wish to become associated with other legal enterprises, in violation of Article I, Section 5.

C. The Act deprives said plaintiffs of the following rights, among others, accorded to them by Article I, Sections 1, 2, 6 and 18:

(1) The right to participate in political and governmental institutions without unwarranted disqualification;

(2) The right to express themselves as members of political and governmental institutions without unwarranted disqualification;

(3) The right to associate with casino licensees and applicants without thereby suffering disqualification from participation and expression in political and governmental institutions, and to consult with them for the common good;

D. The Act constitutes a bill of attainder which penalizes plaintiffs by virtue of their status without regard to their conduct, in violation of Article IV, Section VII, Paragraph 3.

E. The Act impairs the obligations of the contract between each of said plaintiffs and the State existing at the time of its enactment, by altering the terms and conditions governing the respective parties, in violation of Article IV, Section VIII, Paragraph 3.

WHEREFORE, plaintiffs demand judgment against each and every defendant:

1. Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c.79 that impose restrictions upon, mention or otherwise affect special State officers and employees;

2. Declaring unconstitutional and of no force and effect P.L. 1980, c.79 as applied to plaintiffs;

3. Enjoining and restraining defendants, their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c.79 against

plaintiffs, or against any other past, present or future special State officers and employees, and declaring null and void any actions taken to enforce said Act prior to the date of judgment herein;

4. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

5. Ordering defendants to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

6. Granting such other relief as may be necessary and just.

COUNT IV

36. Plaintiffs repeat each of the allegations set forth in Paragraphs 29, 30 and 31 of Count I as if the same were set forth at length herein.

37. The Act has violated and continues to violate the following rights, among others, of plaintiffs as citizens of the State of New Jersey secured to them by the Constitution of the State of New Jersey.

A. The Act deprives said plaintiffs of the following rights, among others, accorded to them by Article I, Sections 1, 2, 6 and 18:

1. The right to participate in political and governmental institutions without unwarranted disqualification;

2. The right to express themselves as members of political and governmental institutions without unwarranted disqualification;

3. The right to associate with casino licensees and applicants without thereby suffering disqualification from participation and expression in political and governmental institutions, and to consult with them for the common good.

B. The Act impermissibly discriminates between those plaintiff citizens who are associated with or wish to become associated with casino licensees or applicants, and those citizens who are associated with or wish to become associated with other legal enterprises, in violation of Article I, Section 5.

C. The Act deprives said plaintiffs of the following substantive due process rights accorded to them by Article I, Section 1:

(1) The right to liberty and to pursuit of their occupational and employment opportunities without unlawful interference by the State;

(2) The right to be free from enforcement by the State of vague civil and criminal statutes and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(3) The right to be free from enforcement by the State of statutes that are overbroad in terms both of the persons and the conduct restrained, and from the "chilling effect" of such statutes upon the constitutionally protected rights of said plaintiffs;

(4) The right to be free from being stigmatized and penalized by virtue of status unrelated to conduct.

D. The Act constitutes a bill of attainder which penalizes plaintiffs by virtue of their status without regard to their conduct in violation of Article IV, Section VII, Paragraph 3.

E. The Act impairs the obligations of the contract between each of said plaintiffs and the State existing at the time of its enactment, by altering the terms and conditions governing the respective parties in violation of Article IV, Section VIII, Paragraph 3.

WHEREFORE, plaintiffs demand judgment against each and every defendant:

1. Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c. 79 that impose restrictions upon, mention or otherwise affect special State officers and employees;

2. Declaring unconstitutional and of no force and effect P.L. 1980, c. 79 as applied to plaintiffs;

3. Enjoining and restraining defendants, their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c. 79 against plaintifts, or upon any other past, present or future special State officers and employees, and declaring null and void any actions taken to enforce said Act prior to the date of judgment herein;

4. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

5. Ordering defendants to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

6. Granting such other relief as may be necessary and just.

COUNT V

AS TO DEFENDANTS GOVERNOR BRENDAN T. BYRNE, ATTORNEY GENERAL JOHN J. DEGNAN, AND MEMBERS OF THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

38. Plaintiffs repeat each of the allegations set forth in Paragraphs 28, 29, 30 and 31 of Count I as if the same were set forth at length herein.

39. The aforesaid violation by said defendants of rights that are guaranteed to plaintiffs as former, present and future special State officers and employees by the United States Constitution is under color of P.L. 1980, c. 79, and therefore violates 42 U.S.C. §§ 1983 *et seq.*

WHEREFORE, plaintiffs demand judgment against each and every defendant named herein:

1. Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c. 79 that impose restrictions upon, mention or otherwise affect special State officers and employees;

2. Declaring unconstitutional and of no force and effect P.L. 1980, c. 79 as applied to plaintiffs;

3. Enjoining and restraining defendants, their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c. 79 against

plaintiffs, or against any other past, present or future special State officers and employees, and declaring null and void any actions taken to enforce said Act prior to the date of judgment herein;

4. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

5. Ordering defendants to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

6. Granting such other relief as may be necessary and just.

COUNT VI

AS TO DEFENDANTS GOVERNOR BBENDAN T. BYRNE, ATTORNEY GENERAL JOHN J. DEGNAN, AND MEMBERS OF THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

40. Plaintiffs repeat each of the allegations set forth in Paragraphs 29, 30 and 31 of Count I and Paragraph 33 of Count II as if the same were set forth at length herein.

41. The aforesaid violation by said defendants of rights that are guaranteed to plaintiffs as citizens of the State of New Jersey by the United States Constitution is under color of P.L. 1980, c. 79, and therefore violates 42 U.S.C. §§ 1983 *et seq.*

WHEREFORE, plaintiffs demand judgment against each and every defendant named herein:

Appendix G

1. Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c. 79 that impose restrictions upon, mention or otherwise affect special State officers and employees;

2. Declaring unconstitutional and of no force and effect P.L. 1980, c. 79 as applied to plaintiffs;

3. Enjoining and restraining defendants, their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c. 79 against plaintiffs, or against any other past, present or future special State officers and employees, and declaring null and void any actions taken to enforce said Act prior to to the date of judgment herein;

4. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

5. Ordering defendants to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

6. Granting such other relief as may be necessary and just.

COUNT VII

AS TO DEFENDANT STATE OF NEW JERSEY

42. Plaintiffs repeat and reallege each of the allegations set forth in Paragraph 30 of Count I as if the same were set forth at length herein.

Appendix G

43. Defendant State of New Jersey entered into an agreement with each of those plaintiff former or present special State officers and employees, at the time each such plaintiff was appointed and agreed so to serve the State of New Jersey, pursuant to which such plaintiff agreed to serve upon a state board or commission for the benefit of the State of New Jersey and the citizens thereof for a term of office and upon other terms and conditions.

44. After entry of the aforesaid agreements between the State of New Jersey and the said plaintiffs, the State of New Jersey unilaterally and without consent of plaintiff special State officers and employees altered the terms and conditions of said agreements by the enactment of P.L. 1980, c. 79, in material breach thereof.

45. Plaintiffs had fully performed all of their obligations under said agreements until defendant's breach thereof.

WHEREFORE, plaintiffs demand judgment against the defendant named herein:

1. Enjoining and restraining defendant, its agents, its employees and those acting in concert with it from enforcing any of the provisions of P.L. 1980, c. 79 against plaintiffs, or against any other past, present, or future special State officers and employees, and declaring null and void any actions taken to enforce said Act prior to the date of judgment herein;

2. Awarding to plaintiffs damages for the violation of their constitutional and other rights;

Appendix G

3. Ordering defendant to reimburse plaintiffs for the costs of this action, including but not limited to attorneys fees;

4. Granting such other relief as may be necessary and just.

HELLRING, LINDEMAN, GOLDSTEIN & SIEGAL
Attorneys for Plaintiffs
By: ROBERT S. RAYMAR
A Member of the Firm

Dated: August 29, 1980

APPENDIX H

Plaintiffs' Amended Complaint Filed September 25, 1980 in the Superior Court of New Jersey

SUPERIOR COURT OF NEW JERSEY

Law Division: Mercer County

Civil Action

Docket No. L-4307-80

MARIJANE SINGER, et al.,

Plaintiffs,

vs.

STATE OF NEW JERSEY, et al.,

Defendants.

Pursuant to R. 4:9-1, plaintiffs hereby amend their complaint against defendants, filed August 29, 1980, by adding the following matter while retaining each and every allegation of the initial complaint:

1. *Caption*

Add MAGDA S. LEUCHTER to list of plaintiffs, which should now read:

> MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY

Appendix H

MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER and MAGDA S. LEUCHTER,

Plaintiffs,

2. Add the following as Paragraph 11A:

11A. Plaintiff Madga S. Leuchter resigned as a Member of the Board of Trustees of Richard Stockton State College in July 1980, and is gainfully employed as a Vice President of Minuteman Publications, Inc.

HELLRING, LINDEMAN, GOLDSTEIN & SIEGAL
Attorneys for Plaintiffs
By: ROBERT S. RAYMAR
A Member of the Firm

Dated: September 24, 1980

APPENDIX I

Defendants' Answer Filed October 17, 1980

SUPERIOR COURT OF NEW JERSEY

Law Division: Mercer County

Civil Action

Docket No. L-4307-80

MARIJANE SINGER, et al.,

Plaintiffs,

vs.

STATE OF NEW JERSEY, et al.,

Defendants.

Defendants, State of New Jersey, Brendan T. Byrne, Governor; Department of Law and Public Safety, John J. Degnan, Attorney General; Executive Commission on Ethical Standards, 122 West State Street, Trenton, New Jersey, by way of answer to the complaint say:

PARTIES

(APPLICABLE to ALL COUNTS)

1. Defendants admit each and every allegation of paragraphs 1 through 22 as to the party plaintiffs and party defendants.

Appendix I

FACTUAL BACKGROUND
(APPLICABLE to ALL COUNTS)

1. The defendants admit each and every allegation of paragraph 23.

2. Paragraphs 24 through 27 present statements and conclusions of law as to the meaning and application of P.L.1980, c.79 which need not be responded to by way of answer and the court is referred to said statute for its meaning and intent.

COUNT I

1. Defendants deny each and every allegation of paragraphs 28 and 29.

2. Defendants deny each and every allegation of paragraph 30 except that it admits those allegations of (b) which indicate that over 175 special State officers and employees resigned their offices or employment before the Act became effective and defendants further admit the allegation contained in (c) that prohibitions of the Act apply to special State officers and employees who did not resign their offices or employment before the effective date of the Act.

3. Defendants deny those allegations in paragraph 31 which state that they have failed to perform their duty to protect and defend the Constitutional rights of plaintiffs. The remainder of paragraph 31 presents statements and conclusions of law as to the meaning and application of P.L.1980, c.79 which need not be responded to by way of answer and the court is referred to said statute for its meaning and intent.

Appendix I

COUNT II

1. Defendant repeats each and every response to the allegation contained in the First Count as if the same were set forth at length herein.

2. The defendants deny each and every allegation of paragraph 33.

COUNT III

1. Defendants repeat each and every response to the allegations contained in the First Count as if set forth at length herein.

2. Defendants deny each and every allegation contained in paragraph 35.

COUNT IV

1. Defendents repeat each and every response to the allegations contained in the First Count as if the same were set forth at length herein.

2. Defendants deny each and every allegation of paragraph 37.

COUNT V

1. Defendants repeat each and every response to the allegations contained in the First Count as if fully set forth herein.

2. Defendants deny each and every allegation of paragraph 39.

Appendix I

COUNT VI

1. Defendant repeats each and every response to the allegations contained in the First Count as if set forth fully herein.

2. Defendants deny each and every allegation of paragraph 41.

COUNT VII

1. Defendants repeat each and every response to the allegations contained in the First Count as if set forth fully herein.

2. Defendants deny each and every allegation contained in paragraphs 43 and 44.

3. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45, except that they deny that any agreements were breached.

FIRST SEPARATE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted on the grounds that P.L. 1980, c.79 does not deprive plaintiffs of any rights secured to them by the United States Constitution or New Jersey Constitution.

Appendix I

SECOND SEPARATE DEFENSE

Those plaintiffs who resigned their special State offices before enactment of the Act have failed to state a claim upon which relief can be granted in that P.L. 1980, c.79 is not retroactive in application.

THIRD SEPARATE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted on the grounds that they have alleged no actions whatsoever taken against them by the individually named defendants.

FOURTH SEPARATE DEFENSE

Defendants are immune from suit.

FIFTH SEPARATE DEFENSE

Plaintiffs have suffered and are in no danger of suffering any immediate and irreparable harm or injury which would entitle them to injunctive relief.

SIXTH SEPARATE DEFENSE

The allegations of plaintiff do not present a cognizable claim under the Federal Civil Rights Act.

Appendix I

SEVENTH SEPARATE DEFENSE

The allegations of plaintiffs do not present a cognizable contract claim under the New Jersey Contractual Liability Act.

RESERVATION OF RIGHT

The defendants reserve the right, at or before the trial of this cause, to move to dismiss the complaint, and/or for summary judgment upon the grounds that the complaint fails to state a claim upon which relief can be granted, and/or defendants are entitled to the judgment as a matter of law, based upon any other or all of the above defenses.

JOHN J. DEGNAN
Attorney General of New Jersey
By: RICHARD J. MURPHY
Deputy Attorney General

I hereby certify that the within answer was served within the time period allowable by the rules governing the courts of the State of New Jersey.

RICHARD J. MURPHY
Deputy Attorney General

Dated: October 17, 1980

APPENDIX J

Oral Opinion of the Hon. George Y. Schoch, Judge, Superior Court, Issued November 25, 1980

SUPERIOR COURT OF NEW JERSEY

Law Division: Mercer County

Docket No. L-4307-80

OPINION

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM and EDWARD KRAMER,

Plaintiffs,

vs.

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Executive Commission on Ethical Standards,

Defendants.

Appendix J

Mercer County Courthouse

Trenton, New Jersey

November 25, 1980

Before: Hon. George Y. Schoch

Hellring, Lindeman, Goldstein and Segal, Esqs.
By: Robert S. Raymar, Esq.
For the Plaintiffs

John J. Degnan, Attorney Genearl
of the State of New Jersey
By: Richard J. Murphy, Deputy Attorney General
for the State of New Jersey

The Court: This matter comes before the Court on Cross Motions for Summary Judgment and is clearly susceptible for Decision as there are no issues of any material fact.

The various plaintiffs have been, and two still are members of State government by way of having been appointed to one or another of the various departments, boards, or commissions, all of these appointive offices being part-time and noncompensatory, and ranging from membership on the New Jersey Highway Authority Commission, Board of Trustees of Rutgers University, Directorship of the New Jersey Transit Corporation, Member of the Board of Trustees of Stockton State College, Member of the State Investment Council, Member of the New Jersey Board of Professional Planners and similar agenies and commissions.

By reason of the passage of Senate Bill Number 1068, which becomes Public Law 1980, c. 79, all of the plaintiffs

except two felt compelled to resign their office because of the proscriptions encompassed within that new act.

Two of the plaintiffs, Miss Singer and Mr. Kramer have not resigned and, therefore, challenge the constitutionality of the act on the basis that it has both restricted their future employment and present employment. All the others have challenged the constitutionality on the ground that the act, itself, would have possibly brought them within the proscription and subjected them to criminal sanctions albeit at the level of disorderly persons.

The plaintiffs take the position that fundamental constitutional rights have been violated by the passage of this act, that there is no compelling State interest which overweighs the violation of those rights and which would justify this act remaining in effect. They further advance, by way of other counts, a challenge on the basis of breach of contract, a challenge on the basis that the act is a bill of attainder.

The challenge to the constitutionality includes the capacity of these plaintiffs in both their public and private capacities as unpaid State Officers and as citizens of the State. The arguments with respect to breach of contract and bill of attainder, have been briefed but not argued before me today, and it seems to me that that is an exercise of good judgment on the part of the plaintiff as I don't consider either of these challenges to be of any efficacy.

The argument is advanced that this act violates First Amendment rights and Fourteenth Amendment rights not only by way of violation of freedom of expression of but also violation of substantive due process and equal protection under the laws.

Appendix J

The State contends that no constitutional fundamental rights are effected by this legislation, that there is a rational basis for the legislation and that even if fundamental constitutional rights are involved, nevertheless, there is a compelling State interest which outweighs and overcomes those rights and which requires that judgment should be entered in favor of the various defendants.

I neglected to mention there is, also, a Count against the individuals for damages which, also, has not been advanced except for the brief, and which I have now considered and which I reject.

These individual defendants are not, in my opinion, subject to damages as alleged in the complaint and as to Count IV, V and VI, those Counts are dismissed.

Count VII, I have already indicated that I am rejecting that claim and dismissing that Count also.

The problem, as I have already expressed in my comments and questions during the oral argument is really directed to two facets: first of all, whether fundamental constitutional rights have been violated, and secondly, whether they have or have not: whether the statute, itself, is overbroad in the extent of its coverage—overbroad to the extent that it has to be considered as being unconstitutional.

I am well aware of the Rules of Law which clock legislative enactments with a presumption of validity and I am even more aware of the position of the Judiciary at the trial level with respect to declaring legislation unconstitutional and it seems to me that the issues have to be clearly resolved before the Court at this level should reach any such conclusion and render a verdict in favor of the plaintiffs.

Appendix J

As I have already expressed, I am concerned about the ambiguity in the Statute with respect to the applicability of the Statute and the sanctions to employees of partnerships, firms, corporation, with which any special State Officer is involved and the extent of that restriction over a two-year period after that State Officer resigns or leaves his position.

It is interesting to note that the Attorney General concedes or at least sets forth in his brief that it is doubtful—and I stress the word doubtful—that such employees were meant to come within the scope of the statute.

Nevertheless, it is not clear to me and the Statute could be read to indicate or define that those employees did come within, and would be subject to the sanctions imposed under Section b. That possibility alone leads the Court towards the conclusion that the Statute has to be considered overbroad.

It is mind boggling to think that some employee, for instance of United Jersey Banks, who decides to leave his employment as a teller and go to work as a card dealer or a stickman for a dice table at the casinos, could possibly lead to the imposition of sanctions against him anytime within two years after Mr. Jesser resigned, and yet that is the interpretation that can legitimately be made from the way the Statute is worded.

Beyond that, I am particularly concerned about the extension of these restrictions and these proscriptions to every special State Officer regardless of whether or not there is any possibility of any connection between the commission or board on which that special State Officer is serving and the operation of the casinos.

Appendix J

I appreciate the fact that the Legislature is—and properly so—extremely concerned with the operation of casinos, the control of the casinos, the fact that they want to make sure that there is no impropriety involved in the operation of that industry, but as I have suggested before, I think this is a matter of overkill and goes far beyond any reasonable basis or any rational basis for restricting the affairs of these special State Officers in the manner in which this legislation restricts it. I can't see where the public interest extends to the limits that are set forth within this statute. I am frankly not convinced that the statute, itself, violates the First Amendment rights. The argument about freedom of expression, that I have attempted to analyze, and that it may be with my own limitations, but I cannot accept Mr. Raymar's argument that a restriction on the employment, within reason, would be a violation of First Amendment rights. But I find that in this particular case, the restriction is not within reason and consequently without reaching the question of whether fundamental constitutional rights are violated, I consider that this statute is so ambiguous, so overbroad and without a rational basis of any state interest that I am constrained to declare it unconstitutional.

I will grant Summary Judgment in favor of plaintiffs for the relief requested in Count I, prayers for relief Number 1 and 2.

I don't think there is any necessity for any Injunction with such a declaration, Mr. Raymar. Do you consider there should be?

Mr. Raymar: I think there should be because it is the extension of a declaration under the Constitution. That that direction means, no one can enforce it.

The Court: Prayer for relief under 3 is also granted under Count I. Numbers 4, 5 and 6 are denied.

The same thing with Count II.

Let us make sure the prayers for relief are the same. Same for Count II, prayers 1, 2 and 3 are granted; 4, 5, and 6, are denied.

Mr. Raymar: Three and 4 are the State constitutional rights.

The Court: Yes. Same thing with Count III and IV; V, VI, and VII are dismissed.

You submit a separate order, Mr. Raymar.

Mr. Raymar: Yes, your Honor.

The Court: Thank you very much.

Mr. Murphy: Thank you Judge.

(The proceedings were concluded)

I Hereby Certify that the foregoing is a true and accurate transcript of the Opinion rendered as taken stenographically by me in the above-stated cause.

MIRIAM M. BARD, C.S.R.
Official Court Reporter

Date: December 4, 1980

APPENDIX K

Order Granting Summary Judgment Filed January 16, 1981

SUPERIOR COURT OF NEW JERSEY

Law Division: Mercer County

Civil Action

Docket No. L-4307-80

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER, and MAGDA S. LEUCHTER,

Plaintiffs,

vs.

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Defendants.

Appendix K

This matter having been opened to the Court by Hellring, Lindeman, Goldstein & Siegal, attorneys for all of the plaintiffs (Robert S. Raymar appearing), upon Plaintiffs' Motion for Summary Judgment on all seven (7) counts of the Complaint filed and served on August 29, 1980 herein, in the presence of the Attorney General of New Jersey, attorney for all of the defendants (Richard J. Murphy, Deputy Attorney General, appearing); and upon Defendants' Cross-Motion for Summary Judgment in their favor on each count of the Complaint; and this Court having read the Certifications filed by each of the twelve (12) Plaintiffs and the Memoranda of Law filed by both counsel for the parties; and this Court having heard extensive oral argument on November 25, 1980; and it appearing that Counts I and II assert Plaintiffs' rights under the Constitution of the United States, Counts III and IV assert their rights under the Constitution of New Jersey (1947), Counts V and VI assert their rights under 42 U.S.C. § 1983, and that Count VII asserts Plaintiffs' contract rights at common law; and it appearing that there are outstanding no genuine issues of material fact and that the matter is otherwise ripe for decision on the motions; and the Court having heard additional argument on January 16, 1981;

IT IS on the 16th day of January, 1981

ORDERED, ADJUDGED and DECREED that:

1. For the reasons stated on the record, P.L. 1980 c. 79, except for Sections 2(d) and 2(e), is overbroad, ambiguous and not rationally related to any legitimate governmental interest insofar as it imposes restrictions upon, mentions, affects or is applied to special State officers and employees; and that

2. Final Judgment be and hereby is entered in favor of Plaintiffs and against Defendants on Counts I, II, III and IV of the Complaint:

(a) Declaring unconstitutional on their face and of no force and effect those provisions of P.L. 1980, c.79, Sections 1, 2, and 3, that impose restrictions upon, mention or otherwise affect special State officers and employees, except for Sections 2(d) and 2(e);

(b) Declaring unconstitutional and of no force and effect P.L. 1980, c.79, Sections 1, 2 and 3, as applied to Plaintiffs, except for Sections 2(d) and 2(e);

(c) Enjoining and restraining Defendants, their agents, their employees and those acting in concert with them from enforcing any of the provisions of P.L. 1980, c. 79, Sections 1, 2 and 3, except for Sections 2(d) and 2(e) against Plaintiffs, or against any other past, present or future special State officers and employees, and declaring null and void any actions taken to enforce said Act as to such special State officers and employees prior to the date of Judgment herein;

3. Final Judgment be and hereby is entered in favor of Defendants and against Plaintiffs on Counts V, VI and VII of the Complaint, and on the demands for damages contained in Counts I, II, III and IV of the Complaint; and that

4. Plaintiffs' "Notice of Motion for Counsel Fees and Costs" is denied.

GEORGE Y. SCHOCH, J.S.C.

APPENDIX L

Opinion of the Appellate Division, Superior Court Filed June 1, 1982

SUPERIOR COURT OF NEW JERSEY

Appellate Division

A-2306-80T3

MARIJANE SINGER, et al.,

Plaintiffs-Appellants,

vs.

STATE OF NEW JERSEY, et al.,

Defendants-Respondents.

Argued May 18, 1982—Decided June 1, 1982

Before Judges Botter, Antell and Furman.

On appeal from Superior Court, Law Division, Mercer County.

Robert S. Raymar argued the cause for appellants (Hellring, Lindeman, Goldstein & Siegal, attorneys; Bernard Hellring, of counsel, and Mr. Raymar, on the brief).

Michael R. Clancy, Deputy Attorney General, argued the cause for respondents (Irwin I. Kimmelman,

Attorney General of New Jersey, attorney; James R. Zazzali, former Attorney General, and Mr. Clancy, on the brief).

PER CURIAM

Appellants are 12 persons who held various unpaid, part-time positions on State authorities, boards and commissions which brought them within the definition of special State officers or employees contained in N.J.S.A. 52:13D-13(e) of the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 *et seq.* By L. 1980, c. 79, effective July 12, 1980, N.J.S.A. 52:13D was amended to provide that no special State officer or employee shall accept employment with any casino licensee or applicant for a casino license. By the provisions of N.J.S.A. 52:13D-17.1 this prohibition extended for a period of two years after termination of such State service. The disability was made to extend to any partnership, firm or corporation with which a special State officer or employee was associated and all partners, officers and employees of such entities. N.J.S.A. 52:13D-16(b).

Appellants brought this action to challenge the constitutionality of this amendment as it applied to special State officers or employees. In addition to the State of New Jersey, the named defendants were various State agencies and officers with authority and responsibility to enforce the Conflicts of Interest Law. Summary judgment was entered in appellants' favor on various counts of their complaint, although their claim for relief under 42 U.S.C.A. §1983 was denied and their claim for counsel fees under 42 U.S.C.A. §1988 was also denied. On this appeal they contend that summary judgment should have been granted in their favor on the §1983 claim and, irrespective of the

§1983 claim, counsel fees should have been awarded because they have prevailed on their contention that the amendment to the Conflicts of Interest Law violated their federal constitutional rights. We agree with these contentions.

Prior to the effective date of L.1980, c.79, more than 185 special State officers and employees resigned from their public positions. Ten of these and two who did not resign, Marijane Singer, who was the chairperson of the Rutgers University Board of Trustees, and Edward Kramer, who was a Member of the Board of Governors of Rutgers University, brought this action. One of the plaintiffs, a member and chairman of the Rutgers University Foundation, Inc., was a partner in Bear Stearns & Co., a firm that was serving as a financial consultant and investment banker to Resorts International, a company that owns and operates a licensed casino in Atlantic City. This plaintiff, like others, resigned from his State position because of the provisions of the amended act which would have disqualified his firm and fellow employees from doing business with or becoming employed by any New Jersey casino licensee or applicant. The disqualification would have extended for a period of two years after this plaintiff left his State office or position, whether or not his position as member of The Rutgers University Foundation, Inc. had anything to do with casinos, much less the power to regulate them.

The trial judge held the statute unconstitutional because it was "overbroad" and was not rationally related to a reasonable state interest. In explanation of this view the trial judge referred to one of plaintiffs who was on the New Jersey Economic Development Council and was also chairman of the board of a large banking corporation in

New Jersey. The trial judge found it inconceivable that an employee of the bank corporation, such as a teller, should be disqualified from employment with a casino because of this plaintiff's State position. He also found it unreasonable to extend these disabilities to every special State officer "regardless of whether or not there is any possibility of any connection between the commission or board on which that special State officer is serving and the operation of the casinos." Accordingly he concluded that the statute went "far beyond any reasonable basis or any rational basis for [so] restricting the affairs of these special State officers. . . ."

Although the trial judge rejected plaintiffs' contention that plaintiffs' First Amendment rights were violated, we believe he accepted plaintiffs' contentions that the statute violated the due process clause of the Fourteenth Amendment by infringing upon their right to pursue occupational and employment opportunities without unreasonable interference by the State, that it was vague and overbroad, and that it had a "chilling effect" upon the free exercise of their rights. We agree that the statute was irrational and unreasonably broad in a fashion that impinged upon plaintiffs' personal liberties. As such injunctive relief pursuant to §1983 was an appropriate remedy. *See Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), where the United States Supreme Court held that injunctive relief against the Virginia Supreme Court and its members in their official capacity as enforcement officials was appropriate although the Virginia Supreme Court and its members were immune from suit under §1983 when acting in their legislative capacity.

Appendix L

Plaintiffs were the "prevailing" parties below within the meaning of 42 U.S.C.A. §1988 with respect to some of their claims and could have been awarded counsel fees against defendants who were State officers or agencies charged with the duty of enforcing the Conflicts of Interest Law. See id., 446 U.S. at 737-739, 100 S.Ct. at , 64 L.Ed. 2d at 657-658; *Carmel* v. *Hillsdale Boro.*, 178 N. J. Super. 185 (App. Div. 1981); *cf. Gurule* v. *Wilson*, 635 F.2d 782 (10 Cir. 1981). The allowance of a counsel fee is discretionary, but the trial judge gave no reasons justifying the denial of counsel fees in this case.

Respondents contend that special circumstances justify a denial of counsel fees in this case and that, in any event, counsel fees should be limited to services rendered on issues on which they prevailed. Clearly, the trial court has discretion both as to the granting of counsel fees and the amount of such fees. In fixing the amount of fees to be awarded numerous factors are to be considered. These include the skill of the attorneys and the relative difficulty or lack of difficulty of the litigation. In addition, such fees should be limited to services deemed reasonably necessary for the case and should not be determined solely by calculation according to the number of hours that may have been clocked, even if done in good faith.

Accordingly, we remand the case to the trial court for consideration of plaintiffs' application for counsel fees against those defendants, in their official capacity, who were charged with enforcement of the Conflicts of Interest Law. We do not retain jurisdiction.

APPENDIX M

Opinion of the New Jersey Supreme Court Decided March 19, 1984

SUPREME COURT OF NEW JERSEY

A-10 September Term 1983

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER, and MAGDA S. LEUCHTER,

Plaintiffs-Respondents,

vs.

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Exeutive Commission on Ethical Standards,

Defendants-Appellants.

Appendix M

Argued September 27, 1983—Decided March 19, 1984
On certification to the Superior Court, Appellate Division.

William Harla, Deputy Attorney General, argued the cause for appellants (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *James J. Ciancia,* Assistant Attorney General, of counsel).

Robert S. Raymar argued the cause for respondents (*Hellring, Lindeman, Goldstein & Siegel,* attorneys; *Mr. Raymar* and *Bernard Hellring,* of counsel).

The opinion of the Court was delivered by HANDLER, J.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("Awards Act" or "section 1988"), permits an award of attorney's fees to successful parties in certain actions brought under particular civil rights statutes. Plaintiffs in this case, asserting a violation of their civil rights, brought an action to invalidate the "Casino Ethics Law," L. 1980, c. 79 ("Law"). They succeeded in obtaining a judgment invalidating the Law and now seek counsel fees under the Awards Act.

The Law that is the focus of plaintiffs' action amended and supplemented the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 to -27. It imposed restrictions upon the business activities and financial interests of unpaid, part-time "special state officers and employees" serving upon the state's public authorities, boards and commissions. The law prohibited any such activities or interests or any direct or indirect employment of such state officers or employees in connection with casino licensees and applicants. N.J.S.A. 52:13D-17.1.

Appendix M

Immediately prior to the Law's effective date, July 29, 1980, almost 2,000 "special state officers and employees" resigned their public offices to avoid the Law's prohibition against direct or indirect gainful involvement in the so-called casino industry or in areas affiliated with or servicing the casino industry. On August 29, 1980, after the Law became effective, plaintiff Marijane Singer, a member of the Board of Trustees of Rutgers University, and eleven other individuals who were or had been "special state officers or employees" serving on various state bodies, filed a complaint against the State of New Jersey, Governor Brendan Byrne, the Department of Law and Public Safety and each member of the State's Executive Commission on Ethical Standards. Counts I and II of the complaint alleged that the Law violated plaintiffs' federal[1] constitutional rights. Counts III and IV stated the law violated plaintiffs' state constitutional rights. Counts V and VI alleged a violation of plaintiffs' rights under the federal Civil Rights Act, 42 U.S.C. § 1983 (1976) ("section 1983").[2] Count VII was a common-law breach of contract

---

[1] Plaintiffs claimed the Law violated substantive due process, the Equal Protection Clause, the Contracts Clause, the Republican Form of Government Clause, the first amendment right to freedom of association, was void for vagueness and overbreadth and constituted a bill of attainder.

[2] 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

claim. The relief sought was a declaratory judgment that the law was unconstitutional, an injunction barring its enforcement, an award of damages and attorneys' fees.

On cross motions for summary judgment, the trial court found for plaintiffs on Counts I through IV and granted the declaratory and injunctive relief sought. However, the court also granted defendants' motion for summary judgment on Counts V through VII and turned down plaintiffs' claim for damages. The effect of the court's judgment was to uphold plaintiffs' claims on both federal and state constitutional grounds but to reject their claims on common-law and statutory grounds, including plaintiffs' claim under section 1983 as set forth in Counts V and VI. The court also denied plaintiffs' subsequent motion for an award of attorneys' fees made subject to section 1988.

Plaintiffs appealed from the trial court's entry of judgment for defendants on Counts V and VI and its denial of attorneys' fees. The Appellate Division reversed that portion of the trial court's judgment concerning the denial of attorneys' fees. It ruled that plaintiffs should have succeeded on their section 1983 claim and that in any event, plaintiffs were entitled to an award of fees under the Awards Act because they prevailed on their federal constitutional claims. Accordingly, the matter was remanded to the trial court for further proceedings to determine whether such fees should be granted and, if so, the amount to be awarded. We granted certification, 93 N.J. 240 (1983).

I

The Awards Act provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this

> title * * * or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964 * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> (42 U.S.C. § 1988.)

The first question presented by this appeal is whether plaintiffs "prevailed" within the meaning of section 1988, entitling them to an award of attorneys' fees.

In order to become entitled to an award of attorneys' fees under the Awards Act, there must be a threshold showing by a prevailing plaintiff of not only a deprivation of a protectable right, but also of some action by defendant "under color of" state law that causes the deprivation of that right. 42 U.S.C. § 1983 (1976); *Flagg-Brothers, Inc.* v. *Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed. 2d 185 (1978); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970). Ordinarily, a plaintiff must demonstrate a "direct causal link between some official conduct of each defendant and the alleged constitutional deprivation" to establish liability under section 1983. *Fialcowski* v. *Shapp,* 405 F. Supp. 946, 950 (E.D. Pa. 1975); *Young* v. *Peoria Housing Auth.,* 479 F. Supp. 1093, 1097 (C.D. Ill. 1979).

In this case, the State argues that this initial requirement for some state action has not been met and that none of the named defendants engaged in any action sufficient to create section 1983 liability. It points out that Governor Byrne allowed L. 1980, c .70, to become law without

his formal signature. Further, neither the Attorney General nor the Executive Committee on Ethical Standards took any steps to enforce the provisions of the Law. Thus, according to the State, the harm asserted by plaintiffs did not arise as the result of any individual's official actions. Rather, the harm arose simply from the passage of the Law itself, which was entirely a legislative action over which none of the defendants exercised any control and for which the Legislature itself would be absolutely immune from suit. *See, e.g. Tenny* v. *Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 2d 1019 (1951).

We disagree that there was an absence of state action sufficient to bring a section 1983 suit. In *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed. 2d 641 (1980), the Supreme Court recognized that it was the power to enforce, and the possibility of future enforcement, that gave rise to liability in a section 1983 action. In that case, a public interest group instituted an action against the Virginia Supreme Court and its Chief Justice, alleging that defendants' promulgation and enforcement of disciplinary rules prohibiting attorney advertising constituted a violation of the first and fourteenth amendments of the United States Constitution. The Supreme Court recognized that Congress, in enacting the Awards Act, did not predicate the award of attorneys' fees upon actions for which state officials traditionally enjoyed immunity. Consequently, the Virginia Supreme Court could not be sued for damages or for declaratory or injunctive relief, and therefore could not be subjected to the award of attorneys' fees in its *legislative* capacity in promulgating the disciplinary rules. *Id.* at 734, 64 L.Ed. 2d at 655. But, the Supreme Court added, because the Virginia court and its Chief Justice were empowered to enforce its regulations and initiate disciplinary

proceedings against attorneys for violations of its disciplinary rules, in that capacity they were not immune from declaratory and injunctive relief and liability for attorneys' fees under the Awards Act. *Id.* at 735-36, 64 L.Ed. 2d at 656-57.

In this case, as well, defendants are sued in their capacity as executive officers, with the power, if not the duty, to enforce the state's laws. Hence, in this context the prerequisite of "state action" has been satisfied and defendants do not enjoy immunity from claims brought under sections 1983 and 1988. Thus, insofar as the absence of state action appears to have been the sole reason for the trial court's rejection of plaintiffs' section 1983 claim, we are satisfied that the Appellate Division was correct in concluding that injunctive relief pursuant to section 1983 was an appropriate remedy.

We are nonetheless admonished by the weight of precedent to focus upon the substantive end results of the litigation to determine whether a plaintiff may be considered a "prevailing party" for an award of attorneys' fees under section 1988. The most commonly employed standard for determining whether a party has "prevailed" within the contemplation of the Awards Act was first articulated in *Nadeau* v. *Helgemoe,* 581 F. 2d 275 (1st Cir. 1978). In *Nadeau,* plaintiffs sought attorneys' fees in connection with their civil suit alleging unconstitutional conditions at the New Hampshire State Prison. The suit resulted in a consent decree that brought about better conditions for plaintiffs. In determining whether plaintiffs had prevailed, the court focused not on the substantive merits of plaintiffs' claims, but rather on the relief ultimately received. Since plaintiffs succeeded in obtaining the essential relief they sought under their claims, they

became prevailing parties. Plaintiffs prevail, according to the court, if they "succeed on any significant issue in litigation which achieves some of the benefit the part[ies] sought in bringing suit." *Id.* at 278-79.

The court in *Nadeau* prescribed a two-fold test to determine whether a litigant qualifies as a prevailing party. A party must demonstrate that his lawsuit was causally related to securing the relief obtained; a fee award is justified if plaintiffs' efforts are a "necessary and important" factor in obtaining the relief. *Id.* at 280. This determination is factual.

In addition, plaintiff must establish that the relief granted had some basis in law. As stated by the court:

> Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.
>
> (*Id.* at 284.)

The Supreme Court has expressly acknowledged the *Nadeau* standard, characterizing it as a "typical formulation." *Hensley* v. *Eckerhart,* —— U.S. ——, ——, 103 S.Ct. 1933, 1935, 76 L.Ed. 2d 40, 50 (1983). As the Supreme Court earlier stated, a party can be considered "prevailing" for the purposes of the Awards Act even though the disposition of the case does not include a final judgment entered in plaintiff's favor, provided plaintiff

has "won substantially the relief originally sought in her [or his] complaint." *Maher* v. *Gagne,* 488 U.S. 653, 659-60, 100 S.Ct. 2570, 2576, 65 L.Ed. 2d 653, 658 (1980). The *Nadeau* standard has been adopted in several jurisdictions, *see, e.g., Harrington* v. *DeVito,* 656 F. 2d 264 (7th Cir. 1981), *cert. den.,* 455 U.S. 993 (1982); *United Handicapped Fed'n* v. *Andre,* 622 F. 2d 342 (8th Cir. 1980); *Williams* v. *Leatherby,* 672 F. 2d 549 (5th Cir. 1982), and has been favorably cited in others. *See, e.g., Johnston* v. *Jago,* 691 F. 2d 283 (6th Cir. 1982); *Bagby* v. *Beal,* 606 F. 2d 411 (3d Cir. 1979).

In our view, *Nadeau* furnishes a satisfactory and workable test for ascertaining whether a party has prevailed for purposes of determining eligibility for the award of attorney's fees under the Awards Act. The test, as noted, first calls for a factual causal nexus between plaintiff's litigation and the relief ultimately achieved. In this case, despite the State's assertions that the Law was not intended by any of the defendants to be enforced and in a sense was moribund when enacted, plaintiffs' suit did succeed in securing a judicial declaration of the invalidity of the Law. Plaintiffs' lawsuit must be deemed to have played a causal role in obtaining this relief. Second, under *Nadeau,* it must be shown that the relief ultimately secured by plaintiffs had a basis in law. Here, the removal of the restrictions imposed by the Law cannot be ascribed simply to official self-restraint. The legal basis for the elimination of these statutory prohibitions came about as a result of the judicial invalidation of the Law.

We are satisfied therefore that plaintiffs are entitled to be considered "prevailing parties" for purposes of section 1988. Sufficient state official action was attendant upon the

enactment of the Law and the implicit legislative mandate calling for its enforcement to render plaintiffs' claims of injury legally cognizable and relief pursuant to section 1983 appropriate. Further, plaintiffs brought an action alleging a violation of their rights under federal and state constitutional grounds, as well as under section 1983. The relief they sought under each of these claims was virtually identical—a declaration of the operative statute's invalidity and an injunction against its threatened enforcement. Even without succeeding on their section 1983 claim, plaintiffs obtained substantially all of the relief they sought. As required in accordance with *Nadeau,* plaintiffs demonstrated that the action they brought was a causal factor in the relief they ultimately achieved. Further, there was a legal basis for that relief—it was predicated upon a judicial declaration of their rights. Thus, plaintiffs have shown entitlement to an award of counsel fees under section 1988.

II

Our conclusion that plaintiffs are "prevailing parties" under the Awards Act brings them across the statutory threshold that entitles them to an award of attorneys' fees. *Hensley* v. *Eckerhart, supra,* —— U.S. at ——, 76 L.Ed. 2d at 50. There remains the perplexing question of determining the "reasonableness" of such fees. Plaintiffs contend that they are entitled to a fee based upon the total number of hours expended by the members of their attorneys' law firm at the prevailing hourly rate charged to the law firm's private clients. They have submitted affidavits authenticating their claims and explaining their cal-

culations, resulting in asserted fees of $166,719.58.[3] The trial court rejected any claims for counsel fees. The Appellate Division concluded that counsel fees should be awarded but remanded the matter for an appropriate determination of those fees. Guidelines to govern the remand are needed.

The Awards Act vests the court with discretion to determine on a case-by-case basis a prevailing party's entitlement to reasonable attorney's fees. The legislative history reveals that the Awards Act seeks to provide "effective access to the judicial process" for citizens striving to vindicate their civil rights. *H.R. Rep. No.* 94-1558, 94th Cong., 2d Sess. 9 (1976). To ensure that section 1988 would not become a "relief fund for lawyers," providing "bonanzas to the legal profession," 122 *Cong. Rec.* 31, 474 (1976), the Awards Act vests the court with discretion to set the amount of the award in individual cases and even to deny fees entirely to prevailing plaintiffs when "special circumstances" would render an award "unjust." *S. Rep. No.* 94-1011, 94th Cong., 2d Sess. 4 (1976); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968) (per curiam) (interpreting Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), which is essentially analogous to section 1988).

---

[3] This figure reflects counsel's request for services expended up to October 12, 1981. Counsel seek $47,512.50 in fees for time spent up to the conclusion of the trial proceedings. This figure represents the product of counsel's customary billing rate multiplied by the hours expended on the litigation. Counsel request that this figure be tripled, to reflect the quality of their overall effort and the contingent nature of success. Costs for post-judgment services (up to October 12, 1981), have not been subjected to this multiplier.

Appendix M

There are certain salutary limitations upon this broad discretionary grant of authority to assess counsel fees in civil rights litigation. Ordinarily, the comparative importance or worth of a particular vindicated right or the public benefit conferred should not constitute a "special circumstance" to be given determinative weight in the decision to award or withhold attorneys' fees. Some courts, however, have used their discretion to deny attorneys' fees when the civil rights vindicated were considered minimal, vexatious or frivolous. *See, e.g., Zarcone* v. *Perry,* 438 F. Supp. 788 (E.D.N.Y. 1977), aff'd, 581 F. 2d 1039 (2d Cir. 1978), *cert. den.,* 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed. 2d 38 (1979); *Martin* v. *Hancock,* 466 F. Supp. 454 (D. Minn. 1979). A sound approach, in our view, is to avoid any assessment of the comparative significance of the particular rights involved in the litigation. To engage in such a weighing process could lead to disparate results, defeat the award of fees in meritorious cases and undermine the implicit rationale of the Awards Act that "the best way to enforce civil rights is by enabling every citizen to vindicate his own injury." Note, *"Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act,"* 80 Colum. L. Rev. 246, 366, 368 (1980).

Nor do we consider as determinative the prevailing party's ability to assume his or her own attorneys' fees. In *Sargeant* v. *Sharp,* 579 F. 2d 645, 649 (1st Cir. 1978), the court squarely rejected the argument that plaintiff's ability to pay his attorney's fee out of an award of damages should be a factor in the decision to award a fee. However, the court did qualify its conclusion by noting that the prevailing party's ability to pay may be considered in setting the amount of the fee. *See also Buxton* v. *Patel,* 595 F. 2d 1182 (9th Cir. 1979).

Appendix M

The legislative history of the Awards Act offers little definitive guidance in giving objective meaning to the term "reasonable." It does, however, cite one illustrative decision, the Fifth Circuit case of *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (1974), which involved a fee award determination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1978). The court there itemized twelve criteria to be considered in determining the size of an award.[4] While many courts have attempted to utilize these factors when determining fee awards under section 1988, *see, e.g., Francia* v. *White*, 594 F. 2d 778 (10th Cir. 1979); *Brown* v. *Bathke*, 588 F. 2d 634 (8th Cir. 1978); *Fountila* v. *Carter*, 571 F. 2d 487 (9th Cir. 1978), the criteria have been critized as unduly cumbersome and "ponderous." *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974) (*Grinnell* I).

Generally, a simpler and more straightforward approach in determining the reasonableness of attorneys' fees has evolved that has met with the approval of an apparent majority of jurisdictions. The most useful starting point for determining the amount of a reasonable

---

[4] These factors are: (1) the time and labor expended by counsel; (2) the novelty and difficulty of the questions presented in the case; (3) the attorney's skill; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount of money involved in the claim; (9) the experience, ability and reputation of counsel; (10) the undesirability of being associated with the cause; (11) the length of the attorney's professional relationship with the client, and (12) awards in similar cases. 488 F. 2d at 717. (As the court noted, these factors were drawn from the Model Code of Professional Responsibility, DR 2-106 (1978).)

fee, noted by the Supreme Court itself, *Hensley,* —— U.S. at ——, 76 L.Ed. 2d at 50, is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This arithmetic result or "lodestar" may then be adjusted upward or downward to reflect any of those factors articulated in *Johnson* v. *Georgia Highway Express, Inc., supra,* and any other considerations that are deemed relevant by the court in the exercise of its sound discretion in light of the objectives of the Awards Act. *Hughes* v. *Repko,* 578 F. 2d 483 (3d Cir. 1978) (adjustments to amount of counsel fees may be made to reflect the quality of the attorney's work, the complexity of the issues presented and the contingent nature of success); *see also Lindy Bros. Builders, Inc.* v. *American Radiator Standard Sanitary Corp.,* 487 F. 2d 161 (3d Cir. 1973) (*Lindy* I). Obviously, even under this approach, considerable discretion must be applied in determining both the reasonableness of the hours expended and the hourly billing rates.

The initial focus in the calculus is appropriately directed to the time expended in pursuing the litigation. The most important factor in dealing with this part of the equation is the actual results obtained. Thus, where a "prevailing" plaintiff has succeeded on only some of his claims for relief, "the product of hours reasonably expended on litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley,* —— U.S. at ——, 76 L.Ed. 2d at 52. While a plaintiff should recover for those hours reasonably related to or supportive of his successful claims, hours devoted to claims that are entirely distinct from the relevant successful claims should be excluded. However, if a plaintiff's unsuccessful claims are related to the successful claims, either by a "common core of facts" or "related legal theories," the court must

consider the significance of the overall relief obtained to determine whether those hours devoted to the unsuccessful claims should be compensated. *Id.* at ——, 76 L.Ed. 2d at 51-52.

If the results obtained are fully effective in vindicating plaintiff's rights, counsel should recover for all hours reasonably expended on the litigation. Conversely, if a successful plaintiff has achieved only limited relief in comparison to all of the relief sought, the court must determine whether the expenditure of counsel's time on the entire litigation was reasonable in relation to the actual relief obtained, *id.*, and, if not, reduce the award proportionately.

As to the reasonable hourly rate, we conclude that the appropriate rate to be applied is the rate that would be charged by a competent and knowledgeable attorney engaged to render legal services in the particular case. The rates to be applied should be those that would be charged by an adequately experienced attorney possessed of average skill and ordinary competence—not those that would be set by the most successful or highly specialized attorney in the context of private practice. *Cf. City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1092, 1098 (2d Cir. 1977) (*Grinnell* II) (court should apply the hourly rate charged for similar work by attorneys of like skill in the area). "Reasonable" attorneys' fees under section 1988 should be "adequate to attract competent counsel" without producing "windfalls to attorneys." *S. Rep. No.* 94-1011, 94th Cong., 2d Sess. 6 (1976). A reasonable fee is based on a billing rate that "would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand." *Hensley,* —— U.S. at ——, 76 L.Ed. 2d at 61 (Brennan, J., dissenting).

Appendix M

An award that applies rates charged by attorneys of ordinary ability, skill and experience should be sufficient to satisfy the primary objective of the Awards Act, namely, to ensure that competent counsel will be available to all persons with *bona fide* civil rights claims. Further, an award made on the basis of such rates does not disserve attorneys who customarily charge higher rates to their private clients. In appropriate cases, they may charge clients in successful civil rights litigation the difference between a reasonable fee awarded under the Awards Act and their normal rates. In those cases in which a civil rights client is unable to pay this difference, the additional fee or cost of litigation may either be absorbed by counsel on a *pro bono* basis, or, alternatively, the client can engage a reasonably experienced attorney of average competence and adequate skill whose billing rates would be acceptable under the Awards Act. Either contingency furthers the essential goal of section 1988—to enable citizens ready access to legal representation in pursuit of their civil rights.

In sum, the court must, in its assessment of an appropriate counsel fee under section 1988, exercise a fine discretion dominated by equitable considerations, understanding that "[t]here is no precise rule or formula for making these determinations." *Hensley,* at ——, 76 L.Ed. 2d at 52.

IV

In conclusion, we determine that plaintiffs in this case are entitled to an award of attorneys fees under section 1988. Further, the matter is remanded for a determination of reasonable fees under section 1988 in accordance with the guidelines set forth in this opinion.

Appendix M

Accordingly, the judgment below is modified and, as modified, affirmed.

Chief Justice Wilentz and Justices Clifford, Schreiber, Pollock and Garibaldi join in this opinion.

Justice O'Hern did not participate.

APPENDIX N

S. Rep. No. 1011, 94th Cong., 2d Sess., *Reprinted in* 1976 U.S. Code Cong. & Ad. News 5908

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

P.L. 94-559, see page 90 Stat. 2641

Senate Report (Judiciary Committee) No. 94-1011, June 29, 1976 [To accompany S. 2278]

House Report (Judiciary Committee) No. 94-1558, Sept. 15, 1976 [To accompany H.R. 15460]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

Senate September 29, 1976

House October 1, 1976

The Senate bill was passed in lieu of the House bill. The Senate Report is set out.

SENATE REPORT NO. 94-1011

[page 1]

The Committee on the Judiciary, to which was referred the bill (S. 2278) to amend Revised Statutes section 722 (42 U.S.C. § 1988) to allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, having considered the same, reports favorably thereon and recommends that the bill do pass.

* * *

Appendix N

PURPOSE

This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975),[1] and to achieve consistency in our civil rights laws.

[page 2]

HISTORY OF THE LEGISLATION

The bills grow out of six days of hearings on legal fees held before the Subcommittee on the Representation of Citizen Interests of this Committee in 1973. There were more than thirty witnesses, including Federal and State public officials, scholars, practicing attorneys from many areas of expertise, and private citizens. Those who did not appear were given the opportunity to submit material for the record, and many did so, including the representatives of the American Bar Association and the Bar Associations of 22 States and the District of Columbia. The hearings, when published, included not only the testimony and exhibits, but numerous statutory provisions, proposed legislation, case reports and scholarly articles.

In 1975, the provisions of S. 2278 were incorporated in a proposed amendment to S. 1279, extending the Voting Rights Act of 1965.

---

[1] 95 S.Ct. 1612, 4 L.Ed.2d 141.

Appendix N

The Subcommittee on Constitutional Rights specifically approved the amendment on June 11, 1975, by a vote of 8-2, and the full Committee favorably reported it on July 18, 1975, as part of S. 1279. Because of time pressure to pass the Voting Rights Amendments, the Senate took action on the House-passed version of the legislation. S. 1279 was not taken up on the Senate floor; hence, the attorneys' fees amendment was never considered.

On July 31, 1975, Senator Tunney introduced S. 2278, which is identical to the amendment to S. 1279 which was reported favorably by this Committee last summer.

Shortly thereafter, similar legislation was introduced in the House of Representatives, including H.R. 9552, which is identical to S. 2278 except for one minor technical difference. The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee has conducted three days of hearings at which the witnesses have generally confirmed the record presented to this Committee in 1973. H.R. 9552, the counterpart of S. 2278, has received widespread support by the witnesses appearing before the House Subcommittee.

STATEMENT

The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). All of

these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizens who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

[page 3]

Congress recognized this need when it made specific provision for such fee shifting in Titles II and VII of the Civil Rights Act of 1964:

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees—* * * to encourage individuals injured by racial discrimination to seek judicial relief under Title II. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[2]

Appendix N

The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized atorneys' fees in laws under which "private attorneys general" play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws, including, among others, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(c) and 78r(a), the Servicemen's Readjustment Act of 1958, 38 U.S.C. § 1822(b), the Communications Act of 1934, 42 U.S.C. § 206, and the Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c). In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum-Griffin),

> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall* v. *Cole,* 412 U.S. 1 (1973),[3] quoting 462 F. 2d 777, 780-81 (2d Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.[1] The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.[2]

Appendix N

Modern civil rights legislation reflects a heavy reliance on attorneys' fees as well. In 1964, seeking to assure full compliance with the Civil Rights Act of that year, we authorized fee shifting for private suits establishing violations of the public accommodations and equal employment provisions. 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k). Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions.

---

[1] For example, the Civil Rights Act of 1866 directed Federal courts to "use that combination of Federal law, common law and State law as will be best adapted to the object of the civil rights laws." *Brown* v. *City of Meridian, Mississippi,* 356 F. 2d 602, 605 (5th Cir. 1966). See 42 U.S.C. § 1988; *Lefton* v. *City of Hattiesburg, Mississippi,* 333 F. 2d 280 (5th Cir. 1964).

[2] The causes of action established by these provisions were eliminated in 1894. 28 Stat. 36.

[2] 88 S.Ct. 964, 19 L.Ed.2d 1263.

[3] 93 S.Ct. 193, 36 L.Ed.2d 702.

[page 4]

E.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; the Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. § 1973*l*(e).

These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy. Before May 12, 1975 when the Supreme Court handed down its decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975)[4]

many lower Federal courts throughout the Nation had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the "private attorney general" concept, were exercising their traditional equity powers to award attorneys' fees under early civil rights laws as well.[3]

These pre-*Alyeska* decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in *Alyeska,* the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the "private attorney general" theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska,* suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. §1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

Appendix N

This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska,* and makes our civil rights laws consistent.

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968).[4] Such "private attorneys general"

---

[3] These civil rights cases are too numerous to cite here. See, e.g., *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala. 1972), aff'd 93 S.Ct. 290, 409 U.S. 942, 34 L.Ed.2d 215 (1972); *Sanford Daily* v. *Zurcher,* 366 F.Supp. 18 (N.D. Cal. 1973); and cases cited in *Alyeska Pipeline, supra,* at n. 46. Many of the relevant cases are collected in "Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcom. on Representation of Citizen Interests of the Senate Comm. on the Judiciary." 93d Cong., 1st sess. pt. III, at pp. 888-1024, and 1060-62.

[4] 88 S.Ct. 964, 19 L.Ed.2d 1263. In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e. g., *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

[4] 95 S.Ct. 1612, 44 L.Ed.2d 141.

Appendix N

[page 5]

should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. *Richardson* v. *Hotel Corporation of America,* 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F. 2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. *United States Steel Corp.* v. *United States,* 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 9 E. P.D. ¶ 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S. Code Cong. & Adm. News 3747; the Marine Protection Act Id. at 4249-50; and the Clean Air Act, Senate Report No. 91-1196, 91st Cong., 2d Sess., p. 483 (1970). See also *Hutchinson* v. *William Barry, Inc.,* 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act).

In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974).[5] Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all is-

sues. See *Bradley, supra; Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet* v. *Esquire Realty Co.*, 523 F. 2d 1005 (2d Cir. 1975), and cases cited therein; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F. 2d 981 (3d Cir. 1970); *Aspira of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced.[5] We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs,[6] will be collected either directly from the official, in his official capacity,[7] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

---

[5] See, e.g., "Hearings on the Effect of Legal Fees," supra.

[6] *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 168 (1927).

Appendix N

[7] Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in *Alyeska.* See *Class* v. *Norton,* 505 F.2d 123 (2d Cir. 1974); *Doe* v. *Poelker,* 515 F.2d 541 (8th Cir. 1975).

[5] 94 S.Ct. 2006, 40 L.Ed.2d 476.

[page 6]

It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express,* 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles,* 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 66 F.R.D. 483 (W.D. N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." *Davis, supra; Stanford Daily, supra,* at 684.

This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision. It does not change the statutory provisions regarding the protection of civil rights except as it provides the fees awards which

are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

• • •

LEGISLATIVE HISTORY

P.L. 94-559

[page 7]

COST OF LEGISLATION

The Congressional Budget Office, in a letter dated March 1, 1976, has advised the Judiciary Committee that: "Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2278, a bill to award attorneys' fees to prevailing parties in civil rights suits.

"Based on this review, it appears that no additional costs to the government would be incurred as a result of the enactment of this bill."

APPENDIX O

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976)

THE CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT OF 1976

SEPTEMBER 15, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. DRINAN, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 15460]

The Committee on the Judiciary, to whom was referred the bill (H.R. 15460) to allow the awarding of attorney's fees in certain civil rights cases, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, authorizes the courts to award reasonable at-

torney fees to the prevailing party in suits instituted under certain civil rights acts. Under existing law, some civil rights statutes contain counsel fee provisions, while others do not. In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision.

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

Statement

A. Need for the Legislation

In *Alyeska Pipeline Service Corp.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court held that federal courts do not have the power to award attorney's fees to a prevailing party unless an Act of Congress expressly authorizes it.[1] In the *Alyeska* case, the plaintiffs sought

[1] The Court in *Alyeska* recognized three very narrow exceptions to the rule: (1) where a "common fund" is involved; (2) where the litigant's conduct is vexatious, harassing, or in bad faith; and (3) where a court order is willfully disobeyed.

to prevent the construction of the Alaskan pipeline because of the damage it would cause to the environment. Although the plaintiffs succeeded in the early stages of the litigation, Congress later overturned that result by legislation permitting the construction of the pipeline. Nonetheless the lower federal courts awarded the plaintiffs their attorney's fees because of the service they had performed in the public interest. The Supreme Court reversed that award on the basis of the "American Rule": that each litigant, victorious or otherwise, must pay for its own attorney.

Although the *Alyeska* case involved only environmental concerns, the decision barred attorney fee awards in a wide range of cases, including civil rights. In fact the Supreme Court, in footnote 46 of the *Alyeska* opinion, expressly disapproved a number of lower court decisions involving civil rights which had awarded fees without statutory authorization. Prior to *Alyeska,* such courts had allowed fees on the theory that civil rights plaintiffs act as "private attorneys general" in eliminating discriminatory practices adversely affecting all citizens, white and non-white. In 1968, the Supreme Court had approved the "private attorney general" theory when it gave a generous construction to the attorney fee provision in Title II of the Civil Rights Act of 1964. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968).[2] The Court stated:

> If (the plaintiff) obtains an injunction, he does so not for himself alone but also as a "private at-

---

[2] In *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972), the Supreme Court applied the "private attorney general" theory in according broad "standing" to persons injured by discriminatory housing practices under the Federal Fair Housing Act, 42 U.S.C. 3601-3619.

torney general," vindicating a policy that Congress considered of the highest importance. *Id.* at 402.

However, the Court in *Alyeska* rejected the application of that theory to the award of counsel fees in the absence of statutory authorization. It expressly reaffirmed, however, its holding in *Newman* that in civil rights cases where counsel fees are allowed by Congress, "the award should be made to the successful plaintiff absent exceptional circumstances." *Alyeska* case, *supra* at 262.

In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys diclosed that such plaintiffs were the hardest hit by the decision.[3] The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

---

[3] See, *Balancing the Scales of Justice; Financing Public Interest Law in America* (Council for Public Interest Law, 1976), pp. 238, 364, D-2).

Appendix O

It should be noted that the United States Code presently contains over fifty provisions for attorney fees in a wide variety of statutes. See Appendix A. In the past few years, the Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety. Although the recently enacted civil rights statutes contain provisions permitting the award of counsel fees, a number of the older statutes do not. It is to these provisions that much of the testimony was directed.

B. History of H.R. 15460

At the time of the Subcommittee hearings on October 6 and 8, and Dec. 3, 1975, three bills were pending which dealt expressly with counsel fees in civil rights cases: H.R. 7828 (same as H.R. 8220); H.R. 7969 (same as H.R. 8742); and H.R. 9552. H.R. 7828 and H.R. 9552 would allow attorney fees to be awarded in cases brought under specific provisions of the United States Code, while H.R. 7969 would permit such awards in any case involving civil or constitutional rights, no matter what the source of the claim. H.R. 7828 was stated in mandatory terms; H.R. 9552 and H.R. 7969 allowed discretionary awards. The Justice Department, through its representative, Assistant Attorney General Rex Lee of the Civil Division, expressed its support of H.R. 9552. Hearings held in 1973 by the Senate Judiciary Subcommittee on the Representation of Citizen Interests also highlighted the need of the public for legal assistance in this and other areas.

In August, 1976, the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice con-

cluded that a bill to allow counsel fees in certain civil rights cases should be reported favorably in view of the pressing need. On August 26, 1976, the Subcommittee approved H.R. 9552 with an amendment in the nature of a substitute because it was similar to S. 2278, which had cleared the Senate Judiciary Committee and was awaiting action by the full Senate. The amendment in the nature of a substitute sought to conform H.R. 9552 technically to S. 2278; no substantive changes were made. It was then reported unanimously by the Subcommittee.

On September 2, 1976, the full Committee approved H.R. 9552, as amended, with an amendment offered by Congresswoman Holtzman and accepted by the Committee. That amendment added title IX of Public Law 92-318 to the substantive provisions under which successful litigants could be awarded counsel fees. The Committee then ordered that a clean bill be reported to the House. H.R. 15460, the clean bill, was introduced on September 8 and approved pro forma by the Committee on September 9, 1976.[4]

C. Scope of the Bill

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, would amend Section 722 (42 U.S.C. 1988) of the Revised Statutes to allow the award of fees in

---

[4] Apart from the addition of Title IX of Public Law 92-318, the only difference between H.R. 9552 and the clean bill (H.R. 15460) are technical, not affecting the substance, made on advice of the House Parliamentarian and staff and legislative counsel.

certain civil rights cases.[5] It would apply to actions brought under seven specific sections of the United States Code.[6] Those provisions are: Section 1981, 1982, 1983, 1985, 1986, and 2000d et seq. of Title 42; and Section 1681 et seq. of Title 20. See Appendix B for full texts. The affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas, while the referenced sections of Title 20 deal with discrimination on account of sex, blindness, or visual impairment in certain education programs and activities.[7]

More specifically, Section 1981 is frequently used to challenge employment discrimination based on race or color.

---

[5] The bill amends the Revised Statutes rather than the United States Code because Title 42 is not codified, and thus is not "the law of the United States."

[6] In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley* v. *Richmond School Board,* 416 U.S. 696 (1974).

[7] To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales* v. *Haines,* 486 F. 2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans* v. *Lavine, supra; United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers* v. *Gibbs, supra* at 725.

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[8] Under that section the Supreme Court recently held that whites as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald* v. *Santa Fe Trail Transportation Co.*, —— U.S .——, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tilman* v. *Wheaton-Haven Recreational Ass'n, Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as the purchase of a home. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[9]

Section 1983 is utilized to challenge official discrimination, such as racial segregation imposed by law. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). It is ironic that, in the landmark *Brown* case challenging school segregation, the plaintiffs could not recover their attorney's fees, despite the significance of the ruling to elminate officially imposed segregation. Section 1983 has also been

---

[8] With respect to the relationship between Section 1981 and Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rept. No. 92-238, p. 19 (92nd Cong. 1st Sess. 1971). That view was adopted by the Supreme Court in *Johnson* v. *Railway Express Agency, supra.*

[9] As with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 are complementary remedies, with similarities and differences in coverage and enforcement mechanism. See *Jones* v. *Mayer Co., supra.*

employed to challenge unlawful official action in non-racial matters. For example, in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), indigent plaintffs successfully challenged as unconstitutional the imposition of a poll tax in state and local elections. In *Monroe* v. *Pape,* 365 U.S. 167 (1961), a private citizen sought damages against local officials for an unconstitutional search of a private residence. See also *Elrod* v. *Burns,* —— U.S. ——, 96 S. Ct. 2673 (June 28, 1976) (discrimination on account of political affiliation in public employment); *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975) (terms and conditions of institutional confinement).

Sections 1985 and 1986 are used to challenge conspiracies, either public or private, to deprive individuals of the equal protection of the laws. See *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971). The bill also covers suits brought under Title IX of Public Law 92-318, the Education Amendments of 1972, 20 U.S.C. 1681-1686. Title IX forbids specific kinds of discrimination on account of sex, blindness, or visual impairment in certain federally assisted programs and activities relating to education. Finally H.R. 15460 would also apply to actions arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-2000d-6.[10]

Title VI prohibits the discriminatory use of Federal funds, requiring recipients to administer such assistance without regard to race, color, or national origin. *Lau* v. *Nichols,* 414 U.S. 563 (1974); *Hills* v. *Gautreaux,* —— U.S. ——, 96 S. Ct. 1538 (April 20, 1976); *Adams* v. *Richardson,* 480 F. 2d 1159 (D.C. Cir. 1973); *Bossier Parish*

[10] Title VI of the Civil Rights Act of 1964 is the only substantive title of that Act which does not contain a provision for attorney fees.

Appendix O

School Board v. *Lemon*, 370 F. 2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *Laufman* v. *Oakley Building and Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

D. Description of H.R. 15460

As noted earlier, the United States Code presently contains over fifty provisions for the awarding of attorney fees in particular cases. They may be placed generally into four categories: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. Existing statutes allowing fees in certain civil rights cases generally fall into the fourth category. Keeping with that pattern, H.R. 15460 tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964,[11] and Section 402 of the Voting Rights Act Amendments of 1975.[12] The substantive section of H.R. 15460 reads as follows:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

---

[11] 42 U.S.C. 2000a-3(b) (Title II); 42 U.S.C. 2000e-5 (k) (Title VII).

[12] 42 U.S.C. 1973(e) (Section 402).

Appendix O

The three key features of this attorney's fee provision are: (1) that awards may be made to any "prevailing party"; (2) that fees are to be allowed in the discretion of the court; and (3) that awards are to be "reasonable". Because other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length.

1. Prevailing party

Under H.R. 15460, either a prevailing plaintiff or a prevailing defendant is eligible to receive an award of fees. Congress has not always been that generous. In about two-thirds of the existing statutes, such as the Clayton Act and the Packers and Stockyards Act, only prevailing plaintiffs may recover their counsel fees.[13] This bill follows the more modest approach of other civil right acts.

It should be noted that when the Justice Department testified in support of H.R. 9552, the predecessor to H.R. 15460, it suggested an amendment to allow recovery only to prevailing plaintiffs. Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating law suits. The Committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under Federal law. In light of existing case law under similar provisions, however, the Committee concluded that the application of current standards to this bill will significantly reduce the potentially adverse affect on the vic-

[13] 15 U.S.C. 15 (Clayton Act); 7 U.S.C. 210(f) (Packers and Stockyards Act).

tims of unlawful conduct who seek to assert their federal claims.

On two occasions, the Supreme Court has addressed the question of the proper standard for allowing fees in civil rights cases. In *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (per curiam), a case involving racial discrimination in a place of public accommodation, the Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Five years later, the Court applied the same standard to the attorney's fee provision contained in Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617. *Northcross* v. *Memphis Board of Education,* 412 U.S. 427 (1973) (per curiam). The rationale of the rule rests upon the recognition that nearly all plaintiffs in these suits are disadvantaged persons who are the victims of unlawful discrimination or unconstitutional conduct. It would be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the juridiction of the federal courts. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enterprises, Inc., supra* at 402.

Consistent with this rationale, the courts have developed a different standard for awarding fees to prevailing defendants because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States,* 519 F.2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circum-

stances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States, supra,* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University,* 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.,* 524 F.2d 1058 (8th Cir. 1975); see also *Richardson* v. *Hotel Corp of America,* 332 F. Supp. 519 (E.D.La. 1971), *aff'd without published opinion,* 468 F.2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460. See, *e.g., Brown* v. *Board of Education, supra; Gautreaux* v. *Hills, supra; O'Connor* v. *Donaldson, supra.* Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. Applying the same standard of recovery to such defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength. The greater resources available to governments

provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.[14]

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be improper to award counsel fees. *Incarcerated Men of Allen County* v. *Fair,* 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews,* 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc.* v. *Board of Education of the City of New York,* 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g., Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377 (4th Cir.), *cert denied,* 409 U.S. 982 (1972); see also *Lea* v. *Cone Mills Corp.,* 438 F.2d 86 (4th Cir. 1971); *Evers* v. *Dwyer,* 358 U.S. 202 (1958).

A prevailing defendant may also recover its fees when the plaintiff seeks and obtains a voluntary dismissal of a groundless complaint, *Corcoran* v. *Columbia Broadcasting System,* 121 F.2d 575 (9th Cir. 1941), as long as the other

---

[14] Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick* v. *Bitzer,* —— U.S. ——, 96 S.Ct. 2666 (June 28, 1976).

factors, noted earlier, governing awards to defendants are met. Finally the courts have also awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief. *Parham* v. *Southwestern Bell Telephone Co., supra; Reed* v. *Arlington Hotel Co., Inc.,* 476 F.2d 721 (8th Cir. 1973).

Furthermore, the word "prevailing" is not intended to require the entry of a *final* order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." *Bradley* v. *Richmond School Board,* 416 U.S. 696, 723 (1974); see also *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). Such awards pendente lite are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . ." *Bradley* v. *Richmond School Board, supra* at 722 n. 28.

2. Judicial discretion

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party.[15] Again the Committee

---

[15] E.g., 7 U.S.C. 499q(b) (Perishable Agricultural Commodities Act); 15 U.S.C. 1640(a) (Truth-in-Lending Act); 46 U.S.C. 1277 (Merchant Marine Act of 1936); 47 U.S.C. 206 (Communications Act of 1934).

adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460.

3. Reasonable fees

The third principle element of the bill is that the prevailing party is entitled to "reasonable" counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fees for similar work, and the amount received in damages, if any. *Accord: Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); see also *United States Steel Corp.* v. *United States, supra.*

Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees.[16] Under the antitrust laws, for example, a plaintiff

---

[16] Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization. *Incarcerated Men of Allen County* v. *Fair, supra; Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd. —— F.2d —— (2d Cir., June 25, 1976); *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974).

may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment. Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees. *Newman* v. *Piggie Park Enterprises, Inc., supra; Northcross* v. *Memphis Board of Education, supra.*

The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of H.R. 15460 will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens.

Oversight

Oversight of the administration of justice in the federal court system is the responsibility of the Committee on the Judiciary. The hearings on October 6 and 8 and Dec. 3,

---

[17] *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

1975, focused on specific pending legislation. However, they did have an oversight purpose, as well, since the impact of the Supreme Court's *Aleyska* decision on the public and the related issue of equal access to the courts were subjects of the hearing.

Committee Vote

H.R. 15460 was reported favorably by a voice vote of the Committee on September 9, 1976. Twenty-seven members of the Committee were present.

Statement of the Committee on Government Operations

No statement has been received on the legislation from the House Committee on Government Operations.

Statement of the Congressional Budget Office

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee estimates there will be no cost to the federal government.

Congress of the United States,
Congressional Budget Office
Washington, D.C., September 7, 1976

Hon. Peter W. Rodino,

Chairman, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Appendix O

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed the Civil Rights Attorney's Fees Award Act of 1976, a bill to award attorney's fees to prevailing parties in civil rights suits to enforce Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Tile IX of P.L. 92-318 or Title VI of the Civil Rights Act of 1964.

Based on this review, it appears that no additional cost to the government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN,
Director.

INFLATIONARY IMPACT STATEMENT

The legislation will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 merely recites the short title of the legislation, "The Civil Rights Attorney's Fees Awards Act of 1976".

Section 2

Section 2 amends section 722 (42 U.S.C. 1988) of the Revised Statutes by adding at the end of that section the following language:

Appendix O

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 722 OF THE REVISED STATUTES

SEC. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall

be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. *In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*

83-2071 (3)

NO. [redacted]

Office - Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Petitioners,

v.

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER and MAGDA S. LEUCHTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT S. RAYMAR
Counsel of Record

HELLRING LINDEMAN GOLDSTEIN SIEGAL & GREENBERG
Attorneys for Respondents Marijane Singer, Judd Levy, Martin Brody, Edward A. Jesser, Jr., Robert F. Kelleher, Frank K. Keleman, Harvey Moskowitz, Leonard Schwartz, Fred R. Sullivan, Carleton A. Holstrom, Edward Kramer and Magda Leuchter
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 621-9020

BERNARD HELLRING
STEPHEN L. DREYFUSS
Of Counsel

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

BEST AVAILABLE COPY

25pp

Counter-Statement of Questions Presented

Whether certiorari should be denied in this matter because no award of attorney's fees has yet been determined or made under 42 U.S.C. §1988.

Whether plaintiffs-respondents who prevail in challenging a New Jersey law on federal constitutional grounds and in obtaining a final judgment declaring the law unconstitutional and enjoining its enforcement, are entitled to judgment under 42 U.S.C. §1983, and to attorney's fees under the "Civil Rights Attorney's Fees Awards Act of 1976", 42 U.S.C. §1988, even though defendants-petitioners, who possessed the authority and duty to enforce the unconstitutional law, had not yet taken action to enforce that law.

Whether there are no "special circumstances" which would render an award of attorney's fees under 42 U.S.C. §1988 "unjust" in this case, where defendants-petitioners possessed the authority and duty to enforce the unconstitutional law and defended that law, but had not yet taken action to enforce it as to plaintiffs.

Interested Parties

The parties identified in the caption of the Petition for Certiorari as well as in the caption of this Brief in Opposition to Petition for Certiorari are the interested parties.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT	5
This Court should not grant certiorari because this matter is not ripe for review, and because the New Jersey Supreme Court's decision in this matter is consistent with recent decisions of this Court	5
A. There has been no award of attorney's fees to the prevailing parties as yet, because the proceedings on remand from the New Jersey Supreme Court have not been completed	6
B. Respondents are entitled to an award of attorney's fees under 42 U.S.C. §1988, because they were the prevailing parties and met the prerequisites for such an award	7
1. Plaintiffs-respondents prevailed within the meaning of 42 U.S.C. §1988 even if they had not obtained favorable judgment on the 42 U.S.C. §1983 counts of their Complaint	8

PAGE

2. Plaintiffs-respondents were entitled to the judgment which has been entered in their favor on the 42 U.S.C. §1983 counts of their Complaint 12

C. There are no "special circumstances" which would render "unjust" an award of attorney's fees to respondents in this case 16

CONCLUSION 18

APPENDIX:

Respondents rely upon the Appendix submitted by petitioners, subject to the objection that much of that Appendix is not in the record of this matter below.

PAGE

Table of Authorities

Cases Cited

Addickes v. *S.H. Kress and Company,* 398 U.S. 144 (1970) 13

Chapman v. *Houston Welfare Rights Organization,* 441 U.S. 600 (1979) 10, 11

Consumers Union of the United States, Inc. v. *American Bar Association,* 505 F.Supp. 822 (E.D. Va. 1982) 14, 15

Consumers Union of the United States, Inc. v. *Virginia State Bar,* 688 F.2d 218 (4th Cir. 1982), *cert. denied,* —— U.S. ——, 103 S.Ct. 3124 (1983) 16

Flagg Brothers, Inc. v. *Brooks,* 436 U.S. 149 (1978) 13

Gurule v. *Wilson,* 635 F.2d 782 (10th Cir. 1980) 8

Hanrahan v. *Hampton,* 446 U.S. 754 (1980) 8

Hensley v. *Eckerhart,* —— U.S. ——, 76 L.Ed.2d 40 (1983) 5

Hutto v. *Finney,* 437 U.S. 678 (1978) 16

Imbler v. *Pachtman,* 424 U.S. 409 (1976) 13

Luria Bros. & Co., Inc. v. *Allen,* 672 F.2d 347 (3d Cir. 1982) 10

Maher v. *Gagne,* 448 U.S. 122 (1980) 4, 7-11

Maine v. *Thiboubot,* 448 U.S. 1 (1980) 17

Monell v. *Department of Social Services,* 436 U.S. 658 (1978) 13

Monroe v. *Pape,* 365 U.S. 167 (1961) 13

PAGE

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 16

Oldham v. *Ehrlich*, 617 F.2d 163 (8th Cir. 1980) 8

Owen v. *City of Independence*, 445 U.S. 622 (1980) 17

Rizzo v. *Goode*, 423 U.S. 362 (1976) 13

Ross v. *Horn*, 598 F.2d 1312, (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980) 8

Singer v. *State*, 95 N.J. 487, 472 A.2d 138 (1984) 3, 4, 6, 17

Smith v. *University of North Carolina*, 632 F.2d 316 (4th Cir. 1980) 8

Supreme Court of Virginia v. *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980) 4, 7, 13, 15, 16

Statutes Cited

42 U.S.C. §1983 .....*passim*

§1988 .....*passim*

United States Supreme Court Rules Cited

Rule 17 6

Rule 17.1 (b) 2

Rule 17.1 (c) 2

NO. 20,064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

MARIJANE SINGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Opinions Below

The opinions below are accurately set forth in Petitioners' Appendix as J (78a to 84a), L (88a to 92a), and M (93a to 109a).

Jurisdiction

Petitioners have not met, and cannot meet, their burden under Supreme Court Rule 17.1(b) and (c), because petitioners have failed to demonstrate that the decision of the New Jersey Supreme Court in this matter is inconsistent with any decision of this Court or of the Courts of Appeals, and because this Court has recently decided the questions of law upon which the New Jersey Supreme Court relied. *See* pages 5-17 *infra*. Therefore, this Court should deny the Petition.

Moreover, there has not been any award to the prevailing parties (respondents) in this matter under 42 U.S.C. §1988. Proceedings on remand from the New Jersey Supreme Court have not been concluded, and the Petition therefore seeks interlocutory review. This Court should not grant review on writ of certiorari before the findings of fact and dollar amounts as to respondents' section 1988 application have been reduced to a court order, and before either or both sets of parties have exhausted their rights to judicial review in the Courts of New Jersey.

Statutes Involved

The statutes involved, 42 U.S.C. §1983 and 42 U.S.C. §1988, are accurately set forth in the Petition, at 2-3.

Counter-Statement of the Case

The New Jersey law that respondents successfully challenged below was P.L. 1980, c.79. *See* Appendix A. Immediately prior to the July 29, 1980 effective date of that law, over 185 unpaid citizens who then served part-time

on various public boards and commissions were forced to resign their offices in order to avoid the onerous provisions and penalties of that law. *Singer* v. *State,* 95 N.J. 487, 490, 472 A.2d 138, 139 (1984) (Appendix M at 95a). Ten of the individuals who resigned, and two others who did not resign and consequently suffered the imposition of the law's burdens, filed the Complaint in this matter on August 28, 1980. *See* Appendix G, H.

The eight individual defendants named in and served with the seven-count Complaint were described by the Complaint as being charged with the authority and duty to enforce the challenged law. Appendix G ¶¶ 14-22. Petitioners admitted those allegations in their Answer. Appendix I ¶ 1. Petitioners continue to admit the authority and duty they had to enforce the challenged law. Petition at 15-16. The provisions of that law applied immediately, automatically, and without exemption. Appendix A. Petitioners also admit that persons found guilty of violating the law were subject to criminal prosecution and to suspension from public office. Petition at 4.

Counts I and II of the Complaint challenged the law under the Constitution of the United States. Counts III and IV challenged the law under the Constitution of New Jersey. The trial court entered judgment in favor of plaintiffs-respondents on all four of those counts. Counts V and VI challenged the law under the federal Civil Rights Act, 42 U.S.C. §1983. The trial court entered judgment against plaintiffs-respondents on those two counts, but that portion of the judgment was *reversed* on appeal by the Appellate Division of the Superior Court of New Jersey. Appendix L. The New Jersey Supreme Court *affirmed* the Appellate Division's decision. Appendix M. Count VII of the Complaint, which presented a cause of action for common law breach of contract, is not now in issue.

The trial court awarded to plaintiffs-respondents all of the relief they sought in their Complaint: the law was declared unconstitutional on its face and as applied; defendants were enjoined and restrained from taking any action to enforce the law; and any actions defendants had taken to enforce the law were declared null and void. Appendix K. Despite plaintiffs-respondents' prevailing party status, the trial court refused to entertain their application for attorney's fees and costs under 42 U.S.C. §1988. Appendix K. The Appellate Division *reversed* that portion of the judgment which denied a section 1988 award to plaintiffs-respondents as prevailing parties. That Court followed *Maher* v. *Gagne,* 448 U.S. 122 (1980), and held that a section 1988 award to the prevailing plaintiffs was in order even if the erroneous adverse judgment entered by the trial court on the section 1983 counts of their Complaint were not also being reversed. In addition, the Appellate Division followed *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.,* 446 U.S. 719 (1980), and held that plaintiffs-respondents were in fact entitled to favorable judgment on their section 1983 counts, thus entitling the prevailing plaintiffs to a section 1988 award for a second reason. Appendix L.

The New Jersey Supreme Court affirmed the Appellate Division as to both parts of the judgment on which the trial court had been reversed. Appendix M. The Petition, at 8, wrongly implies that the New Jersey Supreme Court held a section 1988 award to be appropriate only on *Consumers Union* grounds. The decision, however, is clearly based on *Maher* grounds as well, independent from the *Consumers Union* grounds. 95 N.J. *supra,* at 494-496, 472 A.2d *supra,* at 141-142 (Appendix M at 99a-102a).

Petitioners' "Statement of the Case" is misleading and erroneous in three other essential ways. First, there has been no award of attorney's fees or costs to the respond-

ents, who were the prevailing parties plaintiff below, and so the dollar amount sought in the application under 42 U.S.C. §1988 is irrelevant to the Petition. Second, most of petitioners' "Statement of the Case" draws on material that is not in the record below, including the exposition of alleged reasons why the patently unconstitutional law was enacted and why Governor Brendan T. Byrne failed to veto it. The material found in Petitioners' Appendices C, D, E and F is not in the record below. Third, petitioners did not appeal the judgment entered by the trial court that the state law was unconstitutional and that its enforcement was enjoined. The merits of the unconstitutional law therefore are not now in issue, and it is improper and irrelevant for petitioners now to construct and assert any redeeming features for that law.

ARGUMENT

This Court should not grant certiorari because this matter is not ripe for review and because the New Jersey Supreme Court's decision in this matter is consistent with recent decisions of this Court.

The Petition is nothing more than another tactic in petitioners' continuing classic deep-pocket defense to the prevailing parties' application for attorney's fees and costs held to be proper under 42 U.S.C. §1988 by the New Jersey Supreme Court. Although this Court in *Hensley* v. *Eckerhart*, —— U.S. ——, 76 L.Ed.2d 40 (1983), cautioned that "[a] request for attorney's fees should not result in a second major litigation", —— U.S. at ——, 76 L.Ed.2d at 53, petitioners have already succeeded in delaying the section 1988 award for nearly four years. As four Justices observed in their concurring opinion in *Hensley*:

> "Defendants—who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel—have much to gain simply by dragging out litigation."
>
> "The more obstacles that are placed in the path of parties who have won significant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk of representing civil rights plaintiffs seeking equivalent relief in other cases."

—— U.S. at ——, 76 L.Ed.2d at 64-65.

The issues raised by the Petition are interlocutory in nature as to this matter, and have been recently decided in respondents' favor by this Court. Review by this Court therefore is not warranted under Supreme Court Rule 17 or otherwise.

A. There has been no award of attorney's fees to the prevailing parties as yet, because the proceedings on remand from the New Jersey Supreme Court have not been completed.

The New Jersey Supreme Court did not review a lower court's award or make its own award of attorney's fees and costs in this case. *Singer* v. *State,* 95 N.J. *supra,* 472 A.2d *supra* (Appendix M). That Court held only as follows:

> "In conclusion, we determine that plaintiffs in this case are entitled to an award of attorney's fees under section 1988. Further, the matter is remanded for a determination of reasonable fees under section 1988 in accordance with the guidelines set forth in this opinion."

95 N.J. at 501-502; 472 A.2d at 145 (Appendix M at 108a).

Petitioners' reference to the dollar amount of the fee application, Petition at 3, or to the identity of state officials who would be liable for an award, Petition at 9, 19, or to an asserted "financial drain" upon "the State Treasury", Petition at 9, 19, are all premature. The Petition is interlocutory, because this Court can do no more than speculate about the amount of or justifications for the section 1988 award to be made in the New Jersey courts on remand; about the identity of state officials who may be liable, the amount of their individual liability, or the extent of their indemnification by the State of New Jersey; and about impact of any award upon the State Treasury.

B. Respondents are entitled to an award of attorney's fees under 42 U.S.C. §1988, because they were the prevailing parties and met the prerequisites for such an award.

The Appellate Division of the Superior Court of New Jersey, Appendix L, and the New Jersey Supreme Court, Appendix M, both found two independent reasons for reversing the appealed portion of the trial court's judgment. The reasons were (a) that plaintiffs-respondents were entitled to an award under section 1988 as prevailing parties on their federal constitutional counts, even if they had not obtained a favorable judgment on their section 1983 counts, under *Maher* v. *Gagne, supra;* and (2) that plaintiffs-respondents were entitled to a favorable judgment on their section 1983 counts under *Consumers Union, supra,* and therefore were for a second reason entitled to a section 1988 award. *See* Appendix L (90a); 95 N.J. *supra,* at 493-496, 472 A.2d *supra,* at 141-142 (Appendix M at 99a-102a).

1. Plaintiffs-Respondents prevailed within the meaning of 42 U.S.C. §1988 even if they had not obtained favorable judgment on the 42 U.S.C. §1983 counts of their Complaint.

This Court and the Courts of Appeals have held repeatedly that a favorable final judgment on a section 1983 count of a Complaint is not an essential predicate to an award of attorney's fees under section 1988. *Maher* v. *Gagne,* 448 U.S. 122, 129 (1980); *Hanrahan* v. *Hampton,* 446 U.S. 754, 756-757 (1980); *Gurule* v. *Wilson,* 635 F.2d 782 (10th Cir. 1980); *Smith* v. *University of North Carolina,* 632 F.2d 316 (4th Cir. 1980); *Oldham* v. *Ehrlich,* 617 F.2d 163 (8th Cir. 1980); *Ross* v. *Horn,* 598 F.2d 1312 (3d Cir. 1979), *cert. denied,* 448 U.S. 906 (1980). All that is necessary to support a section 1988 award is for a party to have prevailed in obtaining the essential relief sought by litigation in which a substantial section 1983 claim was pursued. *Maher* v. *Gagne, supra,* 448 U.S. at 130-131.

Maher upheld a section 1988 award against a state government in a case that had been settled without any judgment favorable to plaintiffs. This Court endorsed the District Court's decision that:

> "respondent was the 'prevailing party' within the meaning of §1988 because, while not prevailing 'in every particular', she had won 'substantially all of the relief originally sought in her complaint' in the consent decree."
>
> ". . . [R]espondent was entitled to fees under the Act because, in addition to her statutory claims, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction under the reasoning of *Haguns* v. *Lavine,* 415 U.S. 528."

448 U.S. at 127. This Court went on to explain why a section 1988 award was appropriate despite the trial court's failure to render judgment in plaintiff's favor under section 1983:

> "Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' "

Id. at 129. This Court's concluding statement is especially noteworthy in the present case:

> "Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication."

Id. at 132.

Maher v. *Gagne* recognized that Congress had required in section 1988 only an "action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . .", and not a favorable judgment *on* section 1983 grounds. This Court did not even require plaintiffs to prevail on their federal constitutional claims. *Id.* at 129, n.11. They simply had to allege constitutional claims "sufficiently substantial to support federal jurisdiction", *id.* at 129, n.10, and to win "substantially all of the relief originally sought", *id.* at 127, in order to become entitled to a section 1988 award.

Petitioners would torture section 1988 in an effort to make it read:

> "In any action or proceeding to enforce . . . §1983 . . . the court, in its discretion may allow the prevailing party [except one who obtained adverse judgment on its §1983 claim] . . . a reasonable attorney's fee as part of the costs." (inserted words are in brackets).

Of course, section 1988 does *not* so read because the words within the brackets are *not* in the statute. Petitioners ignore this Court's analysis of sections 1983 and 1988 in *Maher* v. *Gagne, supra,* preferring instead to discuss briefly *Luria Bros. & Co., Inc.* v. *Allen,* 672 F.2d 347 (3d Cir. 1982). Plaintiffs there had lost on all of their federal claims, and had won only on their state claims. This Court in *Maher* v. *Gagne, supra,* held it critical to a section 1988 award absent a favorable section 1983 judgment that "the constitutional issues remained in the case until the entire dispute was" ended. 448 U.S. at 131. In the instant case, as in *Maher* and unlike in *Luria,* "the constitutional issues remained in the case. . . ." In fact, plaintiffs-respondents prevailed on all of their federal claims, Counts I, II, V and VI, and so were entitled to fees and costs under *Maher* and even under *Luria.*

Section 1988 does not require either a favorable section 1983 judgment or avoidance of an unfavorable section 1983 judgment because "§1983 by itself does not protect anyone against anything." *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 617 (1979). It has a "procedural character" and "served only to ensure that an individual had a cause of action for violations of the Constitution". *Id.* This Court in *Maher* v. *Gagne, supra,* explained further the nature of section 1983:

> "Inasmuch as it does not create substantive rights at all, but merely provides a remedy for the viola-

> tion of rights conferred by the Constitution or other statutes, §1983 does not fall within the category of statutes providing for equal rights or civil rights. . . . [Section] 1988 provides that attorney's fees may be awarded to the prevailing party 'in any action or proceeding to enforce §1983'. Although the reference to actions 'to enforce' §1983 is somewhat imprecise in light of the fact that §1983 does not itself create substantive rights, the legislative history makes it perfectly clear that the Act was intended to apply in any action for which §1983 provides a remedy."

448 U.S. at 129, n.11.

Chapman and *Maher* establish that section 1983 is "procedural". Those and other decisions encourage a reluctance to decide on constitutional grounds matters which can be decided on narrow federal or state grounds. *Maher* thus held the sole relevant determination under section 1988 to be whether or not plaintiffs prevailed in vindicating their federal rights. 448 U.S. at 129. As the trial court, Appellate Division, and New Jersey Supreme Court all recognized, plaintiffs-respondents prevailed here because they vindicated important rights protected by the Constitution of the United States, and obtained all of the injunctive and declaratory relief they had sought as to each of the petitioners. Moreover, the Appellate Division and Supreme Court awarded judgment to plaintiffs-respondents on their section 1983 counts.

2. *Plaintiffs-respondents were entitled to the judgment which has been entered in their favor on the 42 U.S.C. §1983 counts of their Complaint.*

The Appellate Division of the Superior Court of New Jersey and the New Jersey Supreme Court both *reversed* that portion of the judgment entered by the trial court which denied to plaintiffs-respondents favorable judgment on their section 1983 counts. Both courts held that the essential elements of a section 1983 cause of action were established by (a) a determination that a state law violated the Constitution of the United States, combined with (b) an admission that defendant state officials were charged with the authority and duty to enforce that unconstitutional law, and with (c) the resignations of hundreds of officials from public office in order to avoid burdens that the law imposed automatically and immediately upon its effective date. *See* Appendix L, M.

Petitioners now present two fallacious arguments: (a) that declaratory relief may not be awarded under section 1983, so that a declaratory judgment issued on federal constitutional grounds will not support an application under section 1988, Petition at 11; and (b) that no legal or equitable relief may be awarded under section 1983 against state officials who admit possessing the authority and duty to enforce an unconstitutional state law, unless the defendants have personally engaged in affirmative conduct to enforce the law and to deprive a plaintiff of a constitutional right. Petition at 15.*

---

* Petitioners confuse section 1983 liability for damages with liability for declaratory and injunctive relief, as they did below. The cases Petitioners cite at 14-15 have no bearing upon the points at issue in this matter because they focus either upon whether a pri-

(Footnote continued on following page)

Supreme Court of Virgina v. *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), disposed of both of petitioners' arguments in a case which was factually and legally identical to the instant one. Pursuant to its inherent and statutory authority to discipline members of its Bar, the Virginia Supreme Court "promulgated the Virginia Code of Professional Responsibility." 446 U.S. at 721. The Virginia Court was found to "have enforcement authority beyond that of adjudicating complaints filed by others. *Id.* at 724. When the Consumers Union attempted to compile a directory of attorneys, many attorneys refused to provide necessary data "for fear of violating the Bar Code's strict prohibition against attorney advertising". *Id.* Consumers Union brought a section 1983 action against the Virginia Supreme Court, the Virginia State Bar, the American Bar Association, the Chief Justice of Virginia, the President of the State Bar Association, and the Chairman of the State Bar Association's Legal Ethics Committee.

> "With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to en-

---

(Footnote continued from preceding page)

vate entity had become imbued with state action, or upon whether a particular defendant was a "person" under section 1983, or upon liability for damages. *See Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Addickes* v. *S.H. Kress and Company*, 398 U.S. 144 (1970); *Monroe* v. *Pape*, 365 U.S. 167 (1961). In such cases, the establishment of an affirmative governmental action injurious to plaintiff is critical. The issues in those cases are not present here, because petitioners are all public entities or officials, and damages are not at issue.

> force the Code. Plaintiffs sought a *declaration* that defendants had violated their First and Fourteenth Amendment rights to gather, publish and receive factual information concerning attorneys practicing in Arlington County, and a permanent *injunction* against the enforcement and operation of DR 2-102(A)(6)."

Id. at 726 (emphasis added). No action whatsoever had been taken or threatened by any defendant to enforce the Disciplinary Rule in question, and no such action had even been alleged. *See, e.g., Consumers Union of the United States, Inc.* v. *American Bar Association,* 505 F. Supp. 822, 282 (E.D. Va. 1981) (Warringer, J. dissenting in part on remand).

Defendants in *Consumers Union* objected to the plaintiffs' section 1988 fee application, but the lower court held the Virginia Supreme Court and its Chief Justice liable for attorney's fees, in part because that Court had declined to amend the Disciplinary Rule to "conform with constitutional requirements". 446 U.S. at 729. The issue before this Court was whether the Virginia Court and its Chief Justice were immune from an award of attorney's fees under 42 U.S.C. §1988. This Court held that for judicial or legislative acts, the defendants were absolutely immune from suits for damages under section 1983 and from any award of attorney's fees under section 1988. *Id.* at 738. However, this Court went on to devastate both of petitioners' present arguments: that section 1983 does not provide *declaratory* relief, Petition at 11-12, and that section 1983 is unavailable until defendants have exercised their enforcement authority. Petition at 14-16:

> "[W]e believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. . . . For this reason the Virginia

> Court and its members were proper defendants in a suit for *declaratory and injunctive* relief, just as other enforcement officers and agencies were."
>
> "If prosecutors and law enforcement personnel cannot be proceeded against for *declaratory* relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case."

Id. at 736-737 (emphasis added).

In *Consumers Union,* this Court reversed the award of attorney's fees only to the extent that it "was premised on acts or omissions for which appellants enjoyed absolute legislative immunity", 446 U.S. at 738, and remanded for determination of whether fees were warranted in defendants' enforcement capacity. *Id.* at 739. This Court's holding directly contradicts petitioners' claim at 11-12 that Congress did not intend a section 1983 judgment or a section 1988 award where plaintiffs-respondents obtained declaratory and injunctive relief preventing enforcement of an unconstitutional law. Plaintiffs-respondents still acted as private attorneys general at their own expense to vindicate federally guaranteed rights; *when* they sued is immaterial to the Congressional policy underlying section 1988.

The Petition (at 19) raises the same spectre of numerous section 1988 awards in New Jersey which this Court rejected in *Consumers Union*:

> "Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a differ-

> ent or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role."

446 U.S. at 739. Petitioners' fear that section 1988 would subject the State of New Jersey to substantial financial responsibility if the State Legislature persists in passing unconstitutional statutes, also has been rejected by this Court as a permissible basis for denying fees. *Hutto* v. *Finney,* 437 U.S. 678 (1978).

The Petition, at 17, quotes at length from the dissenting memorandum of the Chief Justice, in which Justice Rehnquist joined, from the denial of certiorari to the Court of Appeals for the Fourth Circuit in *Consumers Union of the United States, Inc.* v. *Virginia State Bar,* 688 F.2d 218 (4th Cir. 1982), *cert. denied,* —— U.S. ——, 103 S.Ct. 3124 (1983). That quotation in dissent makes it especially clear that the majority of this Court has held that a section 1988 award "may be premised solely on the existence of enforcement authority." —— U.S. at ——, 103 S.Ct. at 3127.

C. There are no "special circumstances" which would render "unjust" an award of attorney's fees to respondents in this case.

The Petition, at 20-21, acknowledges that since the "special circumstances" doctrine was established by *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968), prior to the enactment of 42 U.S.C. §1988 in 1976, that doctrine has been so narrowly circumscribed as to be useless to defendants in section 1988 cases. This is not, as the Petition at 21 suggests, the case to revive that doctrine.

There has been as yet no award of fees to respondents on remand from the New Jersey Supreme Court, so it is literally impossible to determine whether the award in this case is "unjust". Moreover, petitioners' suggestion that they "assumed a passive stance with respect to enforcing" the unconstitutional law, Petition at 18, 22, is misleading in the extereme. According to the New Jersey Supreme Court, "[i]mmediately prior to the law's effective date, July 29, 1980, almost 2000" unpaid, part-time public officials "resigned their public offices to avoid the Law's prohibitions". 95 N.J. at 490, 472 A.2d at 139 (Appendix M at 95a). Petitioners, who could have filed their own action to declare the law unconstitutional and to enjoin its enforcement, instead defended this action with vigor. There is no evidence in the record below "that the defendants at all times acted in good faith." Petition at 22. In any event, the good faith or bad faith of defendants in section 1983 actions or on section 1988 applications is immaterial. *Maine* v. *Thiboutot,* 448 U.S. 1, 5 (1980); *Owen* v. *City of Independence,* 445 U.S. 622, 649 (1980).

CONCLUSION

The New Jersey Supreme Court properly followed this Court's decisions in deciding this matter in favor of respondents. Respondents prevailed below in vindicating important rights protected by the Constitution of the United States, and obtained all of the injunctive and declaratory relief they had sought, against each of the petitioners. Respondents therefore were entitled to an award of attorney's fees and costs under 42 U.S.C. §1988, and to favorable judgment under 42 U.S.C. §1983, and the New Jersey Supreme Court properly so held.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT S. RAYMAR
Counsel of Record

HELLRING LINDEMAN GOLDSTEIN
SIEGEL & GREENBERG
Attorneys for Respondents

BERNARD HELLRING
STEPHEN L. DREYFUSS
Of Counsel

Dated: July 11, 1984